

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Examination of the Future of Media and)	GN Docket No. 10-25
Information Needs of Communities)	
In a Digital Age)	

**COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION ("PFF")**

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EXECUTIVE SUMMARY

Americans today have access to an unprecedented bounty of media riches. Indeed, citizens have more news, information, and entertainment choices at their disposal today than at any point in human civilization. But it is also true that we are in the midst of a major media revolution and no one can be certain what lies ahead for media markets or the journalism profession. With many operators struggling to cope with intensifying competition, digitization, declining advertising budgets, and fragmenting audiences, some pundits and policymakers are wondering what the “future of media” entails. The answer: Nobody knows.

Because this information revolution is so inherently unpredictable, there is great danger in rash government intervention. Change can be gut-wrenching since a great deal of creative destruction is taking place. Nonetheless, policymakers should be careful to not inhibit potentially advantageous marketplace developments, even if some are highly disruptive. Now is *not* the time for public officials to engage in massive media marketplace meddling or attempt to tinker with private media business models in the hopes that something new and better can be created. Our constitutional traditions warn against it, history suggests it would be unwise, and practical impediments render such meddling largely unworkable, anyway.

The perils of extensive government intervention into the affairs of the press should be evident. Making journalists dependent on largess from the public coffers is extremely dangerous, and massive state intervention into the affairs of the press will erode public trust. Even trying to define eligibility for government subsidies is fraught with difficulties and creates the potential for undue government influence. A significant increase in public subsidies for the press also poses the risk that the state will subsidize failure and potentially encourage industrial protectionism of industries that will only grow more dependent on the government for support. Worse yet, media bailouts or massive public media subsidies will impose serious costs on taxpayers and unjustly force them to fund things they might not want or will find offensive.

To the extent there is a role for government, policymakers should focus their efforts on clearing out the regulatory deadwood. The most useful thing the Federal Communications Commission can do to assist media providers is to remove the uncertainty that surrounds the existing regulatory regime, or at least avoid expanding regulatory burdens. In particular, the Commission’s “public interest” regulatory regime, which outlived its usefulness long ago, limits the ability of regulated entities to respond to the rapidly changing marketplace.

Importantly, policymakers must avoid undermining existing media support mechanisms, especially advertising. Advertising has been the hidden, unappreciated benefactor that has sustained a free press historically and policymakers should understand that *an attack on advertising is tantamount to an attack on media itself*. Unfortunately, there are a plethora of new regulatory proposals pending now that would do exactly that. If Washington wages a war on advertising, media providers will suffer.

There are also several specific tax and regulatory proposals for media “reform” that should be avoided. Policymakers should reject embedded taxes on broadband, mobile phones, or other digital devices as a means of cross-subsidizing media. And imposing new taxes on broadcast spectrum or advertising to funnel money to public media is a sure-fire way to undermine the

private provision of media in America. While “news vouchers” and increased postal subsidies are more indirect and less dangerous method, they too have implementation challenges and open the door to more political meddling in media markets.

While we would not entirely reject government support for non-commercial or public media, policymakers should not view public media as a substitute for private media operations. Public media subsidies cannot possibly begin to replace the massive private expenditure that currently supports media content and news-gathering activities in this country. To the extent public subsidies are relied upon going forward, such assistance should be focused on filling niches and supplementing private efforts. In difficult fiscal times, it’s unclear where the money will come from to support the massive media welfare state that some scholars and activist groups advocate. It’s unlikely the taxpaying public has the appetite for massive media bailouts or public media subsidies.

There are some sensible steps the Commission could take immediately to help struggling media enterprises or ensure more information is available to the citizenry. Relaxation of ownership regulations should be first among them. Although consolidation and joint ventures are not silver bullets, it is essential that policymakers grant private media providers the flexibility to restructure their business affairs and continue to provide important public needs, while also turning a profit. Non-profit status for media enterprises might also help at the margins, although it’s unlikely to save firms that are already struggling. But non-profit status should not come with extensive strings attached.

Finally, government itself could do more to make sure that information about itself is more widely available and accessible to the citizenry. Far greater transparency about the affairs of government is essential, and improving the Freedom of Information Act (FOIA) process would facilitate that goal greatly. Beyond this, governments at the federal, state, and local level could work together to create a more accessible public portal for civic affairs programming and information. Such a “Public Square Channel” could more tightly coordinate online efforts and allow easier access to civic affairs information from all levels of government.

In the end, the Commission should reject Chicken Little-esque calls for extreme media “reform” solutions that would destroy the important wall between State and Press and raise profound First Amendment concerns. Policymakers must be patient and willing to allow marketplace flexibility and experimentation; media reform should be organic and bottom-up, not driven by heavy-handed, top-down industrial policies for the press.

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I. INTRODUCTION

It is now widely accepted that we are in the midst of a major media revolution. Because of rapid advances in communications and computing technologies since before the turn of this century, the ways Americans obtain, use, and share information have changed dramatically and there is no indication that the pace of change is slowing. Indeed, perhaps for the first time in history, it is today impossible to predict with any confidence what the media environment of tomorrow will look like. Just as we could never have guessed a few years ago what kind of impact the Internet and information technology—online video, VoIP, portable media devices, 4G mobile services, iPhones and iPads, blogs, Twitter, social networking, *etc.*—would have on the way we use and acquire information in 2010, we cannot know what future dislocations in media creation and consumption will come from new, as yet unknown, innovations in technology.

A. An Uncertain Future Counsels Caution

While no one can be certain what lies ahead for media operators or the profession of journalism, some pessimists claim a veritable cataclysm looms. Media historian Paul Starr of Princeton University’s Woodrow Wilson School fears that the golden age of media is coming to a close and that a “new era of corruption” may be dawning because of the decline of daily newspapers in particular.¹ Andrew Jay Schwartzman of the Media Access Project claims that “journalism is surely in a downward spiral” because “the market is failing” and “the free market

¹ Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, THE NEW REPUBLIC, March 4, 2009, www.tnr.com/article/goodbye-the-age-newspapers-hello-new-era-corruption.

is unlikely to supply [journalism], at least for the foreseeable future.”² Leonard Downie, Jr., Vice President at Large of *The Washington Post*, and Michael Schudson, a Professor at the Columbia University Graduate School of Journalism, predict that many media providers “will no longer produce the kinds of revenues or profits that had subsidized large reporting staffs, regardless of what new business model they evolve.”³ Consequently, they fear, “The days of a kind of news paternalism or patronage that produced journalism in the public interest, whether or not it contributed to the bottom line, are largely gone.”⁴

There is some evidence to substantiate the pessimists’ concerns. The Pew Project for Excellence in Journalism reports that:

The numbers for 2009 reveal just how urgent these questions are becoming. Newspapers, including online, saw ad revenue fall 26% during the year, which brings the total loss over the last three years to 43%. Local television ad revenue fell 22% in 2009, triple the decline the year before. Radio also was off 22%. Magazine ad revenue dropped 17%, network TV 8% (and news alone probably more). Online ad revenue over all fell about 5%, and revenue to news sites most likely also fared much worse. Only cable news among the commercial news sectors did not suffer declining revenue last year.⁵

On the other hand, many optimists argue that things are nowhere near as bad as they seem. “During the past decade, the rhetoric about news provision in the United States has become increasingly steeped in the discourse of disaster,” notes media economist and historian Robert G. Picard, and yet “the situation is not as dire for news firms or journalism as would appear from dominant discourse.”⁶ Indeed, “new media” gurus such as Clay Shirky,⁷ Jeff Jarvis⁸ and Dan Gillmor⁹ argue that the stunning proliferation of user-generation media such as blogs, discussion boards, listservs, social networking sites, Twitter, You Tube, and so on will have a profound, and generally positive, impact on media and journalism. Likewise, in its recent *State of the News Media 2010* report, the Pew Project for Excellence in Journalism reported that

² Andrew Jay Schwartzman, Media Access Project, *Comments In the Matter of News Media Workshops: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?* Federal Trade Commission, Nov. 2009, at 3, www.ftc.gov/os/comments/newsmediaworkshop/544505-00033.pdf

³ Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUMBIA JOURNALISM REVIEW, Oct. 20, 2009, at 75, available at www.scribd.com/doc/21268382/Reconstruction-of-Journalism.

⁴ *Id.*

⁵ Pew Project for Excellence in Journalism, *Introduction*, THE STATE OF THE NEWS MEDIA 2010, March 2010, www.stateofthemediamedia.org/2010/overview_intro.php.

⁶ Robert G. Picard, *Tremors, Structural Damage and Some Casualties, but No Cataclysm: The News about News Provision, Comments In the Matter of News Media Workshops: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?* Federal Trade Commission, Nov. 2009, www.ftc.gov/os/comments/newsmediaworkshop/544505-00029.pdf.

⁷ Clay Shirky, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008).

⁸ Jeff Jarvis, *WHAT WOULD GOOGLE DO?* (2009).

⁹ Dan Gillmor, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* (2004).

“Citizen journalism at the local level is expanding rapidly and brimming with innovation.”¹⁰ The report also noted that, “highly promising citizen and alternative sites are emerging daily. Imaginative news formats, partnerships... technological capabilities and passionate supporters of journalism values offer significant reasons for optimism as journalism continues its mission to inform citizens, make their lives better and nurture democratic processes.”¹¹

B. Historically Speaking, Americans Today Have Access to an Unprecedented Bounty of Media Riches

Working in favor of the optimists is the fact that, while many traditional media operators are certainly struggling, it is equally true that Americans today have access to an unprecedented bounty of media riches. Indeed, citizens have more news, information, and entertainment choices at their disposal today than at any point in human civilization.¹² We now live in a world of unprecedented media abundance, where we can obtain and consume *whatever* media we want, *wherever* and *whenever* we want. Citizens of *all* backgrounds and beliefs benefit from this modern media cornucopia—especially because so many of them are now media creators themselves.

Consider some statistics about the “traditional” media sectors:¹³

- 565 **cable TV** channels¹⁴
- 2,200+ **broadcast TV stations**¹⁵
- 13,000+ **broadcast radio stations**¹⁶
- 20,000+ **magazines**¹⁷
- 276,000+ **books** printed annually¹⁸

¹⁰ Pew Project For Excellence in Journalism, *supra* note 5.

¹¹ Pew Project For Excellence in Journalism, *Community Journalism*, STATE OF THE NEWS MEDIA 2010, March 2010, www.stateofthemediamedia.org/2010/specialreports_community_journalism.php

¹² See Adam Thierer and Grant Eskelsen, The Progress & Freedom Foundation, *Media Metrics: The True State of the Modern Media Marketplace* (Summer 2008), www.pff.org/mediametrics; Adam Thierer, *The Media Cornucopia*, 17 CITY JOURNAL 2 (Spring 2007) at 84-89, www.city-journal.org/html/17_2_media.html.

¹³ Statistics derived from various sources, but many can be found in Thierer and Eskelsen, *Id.*

¹⁴ Federal Communications Commission, *Thirteenth Annual Video Competition Report*, MB Docket No. 06-189, Nov. 27, 2007, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf.

¹⁵ Central Intelligence Agency, THE WORLD FACT BOOK, www.cia.gov/library/publications/the-world-factbook/geos/us.html (data is from 2006).

¹⁶ *Id.*

¹⁷ Magazine Publishers of America, *Magazines: The Medium of Action, A Comprehensive Guide and Handbook 2009/10*, at 8, www.magazine.org/ASSETS/088C8564EB9E4E978A69B183881AEF58/MPA-Handbook-2009.pdf.

¹⁸ Bowker, *Bowker Reports U.S. Book Production Flat in 2007*, May 28, 2008, www.bowker.com/index.php/press-releases/526.

Meanwhile, online / digital media activity continues to explode around the world:

- 1.73 billion **Internet users** worldwide as of Sept 2009; an 18% increase from the previous year.¹⁹
- 81.8 million **.COM domain names** at the end of 2009; 12.3 million **.NET names** & 7.8 million **.ORG names**.²⁰
- 234 million **websites** as of Dec 2009; 47 million were added in 2009.²¹ In 2006, Internet users in the United States viewed an average of 120.5 Web pages each day.²²
- There are roughly 26 million **blogs** on the Internet²³ and even back in 2007, there were over 1.5 million new blog posts every day (17 posts per second).²⁴
- In December 2009, 86% of the total U.S. online population viewed video content.²⁵ The average online viewer watched 187 videos (up 95% from the previous year), while the average length of viewed videos grew from 3.2 to 4.1 minutes.²⁶ The majority of online video viewing (52%) occurred at video sites ranked outside of the top 25, suggesting the increased fragmentation of online video and the emergence of sites in the "long tail."²⁷
- **YouTube** reports that 20 hours of video are uploaded to the site every minute,²⁸ and 1 billion videos are served up daily by YouTube, or 12.2 billion videos viewed per month.²⁹
- As of Nov 2009, users on video hosting site **Hulu** were viewing 924 million videos per month in the U.S.³⁰
- Developers have created over 150,000 apps for the Apple iPhone,iPod and iPad and made them available in the **Apple App Store**.³¹ Customers in 77 countries can choose apps in 20 categories, and users have downloaded over three billion apps since its

¹⁹ Royal Pingdom, *Internet 2009 in Numbers*, Jan. 22, 2010, <http://royal.pingdom.com/2010/01/22/internet-2009-in-numbers>.

²⁰ *Id.*

²¹ *Id.*

²² Gavin O'Malley, *Comcast Taps Hispanic Web Portal*, MediaPost News, ONLINE MEDIA DAILY, March 8, 2006, www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=40714.

²³ Royal Pingdom, *supra* 19.

²⁴ David Sifry, *The State of the Live Web*, April 2007, www.sifry.com/alerts/archives/000493.html.

²⁵ comScore, *The 2009 U.S. Digital Year in Review - A Recap of the Year in Digital Marketing 10*, Feb. 2010, http://www.comscore.com/Press_Events/Press_Releases/2010/2/comScore_Releases_2009_U.S._Digital_Year_in_Review.

²⁶ *Id.*

²⁷ *Id.* at 12.

²⁸ Ryan Junee, *Zoinks! 20 Hours of Video Uploaded Every Minute!*, BROADCASTING OURSELVES: THE OFFICIAL YOUTUBE BLOG, May 20, 2009, http://youtube-global.blogspot.com/2009/05/zoinks-20-hours-of-video-uploaded-every_20.html

²⁹ Royal Pingdom, *supra* note 19.

³⁰ *Id.*

³¹ Apple, *Thousands of apps made just for iPad. With more coming every day.*, www.apple.com/ipad/app-store.

inception in July 2008.³² Apple's iTunes Store has a catalog of 12 million songs, over 55,000 TV episodes, and 8,500 movies, and has sold more than 10 billion songs.³³

- Social networking giant **Facebook** reports that each month, its 400+ million users upload more than 3 billion photos, and create over 3.5 million events. More than 3 billion pieces of content (web links, news stories, blog posts, notes, photos, *etc.*) are shared each week. There are also more than 3 million active Pages on the site.³⁴
- There are 10 million edits made to **Wikipedia** every seven weeks.³⁵
- Twitter users send out 50 million tweets per day, an average of 600 tweets per second.³⁶
- There are 4 billion photos hosted by **Flickr** as of Oct 2009.³⁷

C. Humility, Not Hubris, is the Proper Policy Disposition

Not surprisingly, all this competition for our eyes and ears is placing an enormous strain on traditional media operators and business models, especially the newspaper industry.³⁸ That's left a lot of pundits and policymakers wondering, as the FCC is doing in this proceeding, what the "future of media" entails—or as the Federal Trade Commission asks in another proceeding, "how will journalism survive the Internet Age?"³⁹

In other words, depending on how one looks at it, it is both the best of times and the worst of times since, to some extent, "both the optimists and the pessimist are right," as a recent Harvard Berkman Center report noted.⁴⁰ "It is an exciting moment for news, and a frightening one," says Alex S. Jones, author of *Losing the News*.⁴¹ Whether you believe the glass is half

³² Press Release, Apple, *Apple's App Store Downloads Top Three Billion* (Jan. 5, 2010), www.apple.com/pr/library/2010/01/05appstore.html.

³³ Press Release, Apple, *iTunes Store Tops 10 Billion Songs Sold* (Feb. 25, 2010), www.apple.com/pr/library/2010/02/25itunes.html.

³⁴ Facebook, *Statistics*, www.facebook.com/press/info.php?statistics (last accessed March 2, 2010).

³⁵ Katalaveno, *Edit Growth Measured in Time Between Every 10,000,000th Edit*, en.wikipedia.org/wiki/User:Katalaveno/TBE (last accessed Mar. 2, 2010).

³⁶ Twitter Blog, *Measuring Tweets*, Feb. 22, 2010, <http://blog.twitter.com/2010/02/measuring-tweets.html>.

³⁷ Royal Pingdom, *supra* 19.

³⁸ Joseph Plambeck, *Newspaper Circulation Falls Nearly 9%*, NEW YORK TIMES, April 26, 2010, www.nytimes.com/2010/04/27/business/media/27audit.html

³⁹ Federal Trade Commission, *How Will Journalism Survive the Internet Age?* www.ftc.gov/opp/workshops/news/index.shtml

⁴⁰ Persephone Miel and Robert Faris, Harvard University Berkman Center for Internet & Society, *News and Information as Digital Media Come of Age*, Dec. 2008, at 4, http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Overview_MR.pdf ["The Internet is reinventing the media environment, which in turn is changing politics and society, for better and for worse. Some innovations have succeeded beyond their creators' imagination, while the growth predicted in other areas has been lower than expected. The most dire predictions about the imminent collapse of professional journalism have failed to materialize, but negative effects that no one predicted have also occurred, including within the experiments of legacy media."]

⁴¹ Alex S. Jones, *LOSING THE NEWS: THE FUTURE OF THE NEWS THAT FEEDS DEMOCRACY* (2009) at 220.

empty or half full depends on how bullish you are about the future of technology and market evolution to change things for the better.

Because this information revolution is so inherently unpredictable, there is great danger in rash government intervention. With so much creative destruction taking place,⁴² change can be gut-wrenching. But policymakers should be careful to not inhibit potentially advantageous marketplace developments,⁴³ even if some are highly disruptive.⁴⁴ Now is *not* the time for public officials to engage in media marketplace meddling or attempt to tinker with private media business models in the hopes that something new and better can be created. Our constitutional traditions warn against it, history suggests it would be unwise, and pragmatic impediments render such meddling largely unworkable, anyway.

We are pleased to hear the Commission's pledge that "We will remain mindful of the Hippocratic Oath of physicians, 'First, do no harm.'"⁴⁵ But continuing on, as the agency does in this proceeding, to ask dozens of questions—115, by our count—about every conceivable aspect of the media industry's business, is not exactly an exercise in regulatory humility. No one can know with any degree of certainty what "the information needs of citizens and communities" are.⁴⁶ As James T. Hamilton of Duke University has aptly noted, "The social sciences currently do not provide good answers on how much news is enough to make democracy's delegated decision making work well."⁴⁷ And no one can accurately predict what the future holds for any particular media sector or technology. As Clay Shirky argues:

⁴² "When the TV Age finally succumbs to the Digital Age, we will be living in a different world. And (mainly) a much better one. But for those entrenched in the status quo, involuntary change can be a difficult concept to accept." Bob Garfield, *THE CHAOS SCENARIO* (2009).

⁴³ Dorian Benkoil, Senior Vice President of Teeming Media, puts it nicely:

I'm not saying today's media have made things all sweetness and light, that digital is saving us and everyone is holding hands and dancing together in sun-filled meadows. But we're getting some clarity about information sharing and attribution, fraud is being detected, fairness and even-handedness are being demanded, the megaphone is being shared, and advertisers are able to demand evidence that their ads are actually being seen. Meanwhile, there is huge disruption. This is not a time for the faint of heart or those unwilling to learn and change. But, for so many reasons and in so many ways, things are better than they used to be.

Dorian Benkoil, *How Journalism is Getting Better*, MEDIA SHIFT, March 15, 2010, www.pbs.org/mediashift/2010/03/how-journalism-is-getting-better074.html

⁴⁴ "The disruption of existing business models by substitute technology is an old story in American business," Philip Meyer reminds us. "The old businesses hang on too long to their accustomed ways of doing things and become ripe targets for upstart competitors who are not burdened by tradition." Philip Meyer, *THE VANISHING NEWSPAPER: SAVING JOURNALISM IN THE INFORMATION AGE* (2004) at 2.

⁴⁵ Federal Communications Commission, *FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC Public Notice, GN Docket No. 10-25, Jan. 21, 2010, at 2, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-100A1.pdf

⁴⁶ *Id.* at 3.

⁴⁷ James T. Hamilton, *ALL THE NEWS THAT'S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS* (2004) at 3.

When someone demands to know how we are going to replace newspapers, they are really demanding to be told that we are not living through a revolution. They are demanding to be told that old systems won't break before new systems are in place. They are demanding to be told that ancient social bargains aren't in peril, that core institutions will be spared, that new methods of spreading information will improve previous practice rather than upending it. They are demanding to be lied to.⁴⁸

It is also somewhat ironic that the Commission asks "Do citizens and communities have all the information they want and need?"⁴⁹ when the agency often acts *in direct contradiction* to clear consumer demands by regulating media content or steering media decisions and business models in various directions (if not foreclosing some decisions and models entirely). It would seem the Commission is more focused on what consumers "need" (*i.e., ought to want*) rather than what they *actually* want. Instead, the Commission should be patient, avoid techno-crystal ball gazing, and avoid picking winners and losers among industry sectors, platforms, and technologies.

To the extent there is a role for government here, policymakers should focus government efforts on simply helping private markets to work better by clearing out the regulatory deadwood so that a truly free press can continue to serve, for another two centuries, a truly free people.

II. GREATER GOVERNMENT INVOLVEMENT IN THE MEDIA SECTOR—EVEN FOR PURPORTEDLY BENEFICENT REASONS—BETRAYS THE FIRST AMENDMENT, THREATENS A FREE PRESS, IS RISKY FOR TAXPAYERS & IS UNWISE FOR MANY OTHER REASONS

James Madison's version of the press clause in the Bill of Rights, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."⁵⁰ Over two hundred years of experience has proven him right about the value of having a free press, and independent journalism remains today one of the most important checks on government power and its abuse.

The First Amendment, as it was adopted and has been interpreted by the courts, is largely responsible for preserving that important role. Among all of the rights enumerated in the first ten amendments, which each limits the scope of permissible government action, the speech and press clauses stand apart as necessary to maintain the balance of power between the people and those elected to govern them. Indeed, as others have noted, there is a certain

⁴⁸ Clay Shirky, *Newspapers and Thinking the Unthinkable*, CLAY SHIRKY BLOG, March 13, 2009, www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable.

⁴⁹ *Id.*

⁵⁰ 1 ANNALS OF CONGRESS 434 (1789).

“firstness” to the First Amendment: All of the other guarantees in the Bill of Rights might quickly fade if there is not an aggressive and uninhibited press ready, willing, and able to report on government transgressions.

We must be more than a little wary, therefore, when suggestions are made that would integrate the press and our public governing institutions. Although we are not accustomed to using the strict separation language when we talk about the wall between the state and a free media, that wall is implicit and essential in our Constitutional structure. If the press is to remain a “great bulwark of liberty,” it must remain wholly independent of the state; indeed, the state and the press should be adversaries, not allies, and the wall between State and Press should be as high and as strong as possible.

A. The Very Nature of This Proceeding Raises a Potential “Chilling Effect”

The very act of initiating this proceeding raises First Amendment concerns since it could chill protected speech. If the First Amendment’s press clause means anything, it means that publishers are not to be subjected to “prior restraints.” The licensing system used in England at the end of the 17th Century, to which the framers of our constitution were responding when they adopted the First Amendment, required that all printing presses were to be licensed and that nothing could be published without prior approval of state authorities. Freedom of the press to the framers meant, first and foremost, the freedom to publish without a license and without having to seek prior approval.⁵¹

In this case, the FCC inquiry acts implicitly as a prior restraint. The FCC has essentially warned those who produce journalism that “it is watching,” and as any parent who ever has warned a child that the parent is watching knows what the intended effect of those words is: to curtail or encourage a particular behavior in the child. While regulation by “raised eyebrow” has become a well-established regulatory tool, this inquiry takes the concept to a level heretofore unknown—regulation by penetrating leer.⁵²

What are those who are in the media business and already highly regulated by the FCC to do in response to this inquiry? Do they risk incurring a more activist FCC if they do not produce the kind of journalistic content the FCC desires? And how are they to determine what that desired content should look like? Is it enough to read between the lines of the instant notice of inquiry, or should they perhaps directly ask this particular group of government bureaucrats what would satisfy them?

These rhetorical questions highlight the underlying truth of the matter: Government inquiries into what is, and what is not, working in the area of news, information, and media are themselves an affront to the First Amendment. There is no possibility that such an inquiry can be carried through without the inquiry itself becoming a tool for shaping the behavior of those

⁵¹ See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-16 (1931); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 49 (1971); *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

⁵² See Robert Corn-Revere (ed.), *RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA* (1997).

whose conduct and actions are being examined. Sometimes the very act of observing a thing changes it; a government examination of the press is such a case.

B. Making Journalists Dependent on Largess from the Public Cooffers Is Dangerous

As to the substance of the issues raised in the inquiry, the underlying suggestion that the government should work in concert with the press to encourage the production of quality journalism is itself fundamentally in tension with the First Amendment. Any system in which journalists would look to public funding and support in any substantial way, as some have advocated, would irreparably compromise journalistic independence. The prospect of a large swath of the American media functioning as publicly funded wards of the State does not merely portend a small leak in the First Amendment's protective barrier between the Press and the State; *it is the end of that barrier and the end of an independent press.*

This is not to suggest that anyone either in the media or the government would institute or participate in such a program with corrupt motives (though that is certainly not out of the question). But even those whose intentions are pure would be subject to irreconcilable pressures. Who, for instance, as a journalist could help but keep a wary eye on the source of his livelihood as he/she investigated a story on government corruption? On the other hand, how long would it be before a public official succumbed to the temptation to pressure a reporter to bias a story in a particular way, or to kill a story entirely?⁵³

One would hope that reporters might be able to look beyond the fact that their paychecks were cut against the public treasury, and it is no doubt true that our elected officials are for the most part honorable men and women, but the First Amendment is premised on the notion that we should not stake our freedom on either proposition. In the end, a significant expansion of public support for news-gathering would dampen the incentive for aggressive reporting on government activities or abuse, and invite political meddling in the news that is ultimately is disseminated to the public.

As a First Amendment matter, such a "federalization of journalism or the media" is intolerable.⁵⁴ As Paul Starr, Stuart professor of communications and public affairs at the Woodrow Wilson School at Princeton University, has argued, "if we want a press that is independent of political control, we cannot have government sponsoring or bailing out specific papers."⁵⁵ Similarly, News Corp. Chairman and CEO Rupert Murdoch recently argued that, "the

⁵³ See Adam Thierer, *Socializing Media in Order to Save It*, CITY JOURNAL, March 27, 2009, www.city-journal.org/2009/eon0327at.html.

⁵⁴ *Comments of the National Religious Broadcasters, In the Matter of Examination of the Future of Media and Information Needs of Communities in a Digital Age*, Federal Communications Commission, GN Docket No. 10-25, Feb. 18, 2010, at 4, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020391058>. [Noting the need to avoid "the federalization of journalism or the media... given the fact that media freedom is a constitutionally protected right... federal intrusion into the business of journalism is fraught with problems."]

⁵⁵ Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, THE NEW REPUBLIC, March 4, 2009, www.tnr.com/article/goodbye-the-age-newspapers-hello-new-era-corruption.

growing drumbeat for government assistance for newspapers is as alarming as overregulation.”⁵⁶ He continues:

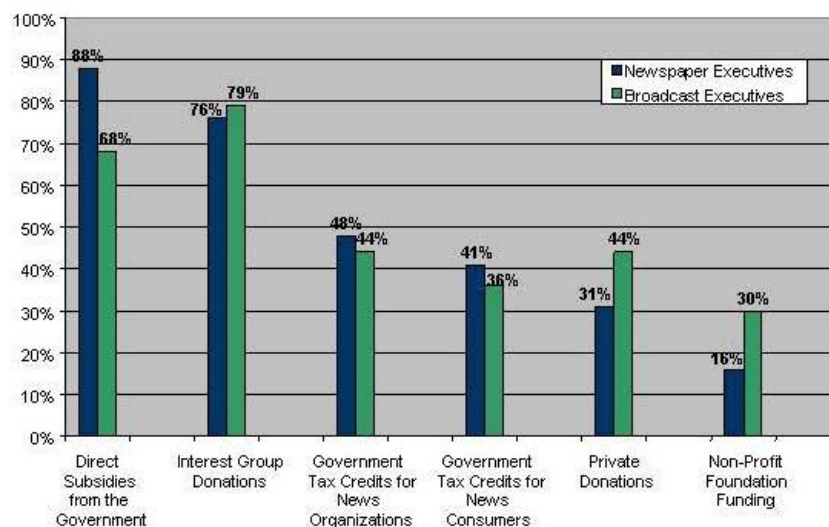
The prospect of the U.S. government becoming directly involved in commercial journalism ought to be chilling for anyone who cares about freedom of speech. The Founding Fathers put the First Amendment first for a reason: they knew that a free and independent press was vital to any self-governing people.⁵⁷

Likewise, in comments to the FTC, the Newspaper Association of America recently noted that:

The newspaper industry is not seeking a financial “bailout” or any other kind of special subsidy from the federal government. Newspapers do not believe that direct government financial assistance is appropriate for an industry whose core mission is news gathering, analysis and dissemination—often times about the government.⁵⁸

Exhibit 1: News Executives Skeptical of Government Intervention

SERIOUS RESERVATIONS OVER ALTERNATIVE FUNDING (% WHO EXPRESSED SERIOUS RESERVATIONS)



Question: "Here are some alternative options for funding journalism. For each, please tell us if you have any reservations or would welcome such funding." Those who responded "serious reservations" are represented in the chart above.

⁵⁶ Rupert Murdoch, *Remarks before the Federal Trade Commission's Workshop on From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?* Dec. 1, 2009, at 16, www.ftc.gov/opp/workshops/news/docs/murdoch.PDF.

⁵⁷ *Id.* at 17.

⁵⁸ Paul J. Boyle, Sophia Cope & Jennifer L. Hall, *Comments of the Newspaper Association of America In the Matter of News Media Workshops: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?* Federal Trade Commission, Nov. 6, 2009, at 6, www.ftc.gov/os/comments/newsmediaworkshop/544505-00015.pdf.

Luckily, many newspaper and broadcast executives agree. A recent survey by the Pew Research Center's Project for Excellence in Journalism in association with the American Society of News Editors (ASNE) and the Radio Television Digital News Association (RTDNA) revealed that, "Fully 75% of all news executives surveyed—and 88% of newspaper executives—said they had 'serious reservations,' or the highest level of concern, about direct subsidies from the government."⁵⁹ A smaller percentage (only 46%) had serious reservations about tax credits for news organizations. On the other hand, only 13% said they "would welcome such funding" and just 6% said they were "enthusiastic" about it.

C. Defining the Eligible Class of Subsidy Recipients Is Fraught with Difficulties

Pragmatic considerations also militate against increased government involvement in the media business. To the extent the government would provide direct or indirect funding and other support for the media, how would the government determine which entities it would support, and who within the government would make that determination? "One of the endless arguments now taking place in journalism circles is about how to define what a journalist is," notes Harvard University's Alex S. Jones, author of *Losing the News*.⁶⁰ Similarly, what counts as a "media entity" in today's wide-open media universe? Will bloggers be eligible for support? Could foreign-owned news entities qualify for support from U.S. taxpayers? Will government make decisions about the kinds of content that merit support? There may well be rational ways to make cuts along these lines, but they are all almost certainly unconstitutional. Next to unambiguous prior restraints, government preferences among speakers or classes of speakers are constitutional sins of the highest order.

It is just such choices that open the door to the most abusive government intrusion into the production of journalism. It's not hard to imagine that government regulators, even with the best of intentions and acting in the utmost good faith, would, perhaps unconsciously, favor speakers and classes of speakers to which they felt the closest affinity. And, because administrations come and go, as do members of Congress, no particular class of speakers would ever be truly safe—no story would be reported without at least a glance by the author over her shoulder (sometimes left, sometimes right) to make sure that she had not offended the "wrong" person. That is not an approach consistent with a free press reporting to a free people.

Moreover, the very act of defining eligibility leads to the danger of government licensure of the press. When Rosa Brooks, a former *Los Angeles Times* journalist, speaks of "using tax dollars and granting licenses" as part of a press bailout, it foreshadows the more regulatory future to come.⁶¹ Indeed, one is challenged to identify any historical example of a heavily-subsidized industry or profession that was not also heavily regulated. But occupational licensure in the journalistic field is particularly problematic for the reasons already discussed. In the end, whatever the mechanism, government meddling with the press would undermine the very

⁵⁹ www.journalism.org/sites/journalism.org/files/Topline_Economic_Survey.pdf.

⁶⁰ Alex S. Jones, *LOSING THE NEWS: THE FUTURE OF THE NEWS THAT FEEDS DEMOCRACY* (2009) at 194.

⁶¹ Rosa Brooks, *Bail Out Journalism*, *LOS ANGELES TIMES*, Apr. 9, 2009, <http://articles.latimes.com/2009/apr/09/opinion/oe-brooks9>.

foundation of the Fourth Estate, rendering it a mere subsidiary of the “three estates of Parliament.”⁶² These concerns are as discussed further in Section V.

D. Massive State Intervention Will Erode Public Trust in the Press

FCC Commissioner Meredith Attwell Baker correctly contends that there is a very real risk that, “direct government funding of journalism will erode the public’s trust in media.”⁶³ She notes:

This is not a question of journalistic integrity or ethics. Rather, our nation is already too cynical and skeptical of the independence of the press. Pew has found that only 20 percent of Americans believe news organizations are independent of powerful interests. Pew also reports that 60 percent of Americans believe news organizations are politically biased. Combining these metrics with government-sponsored journalism is not a recipe for success in my view. Funding—no matter how well-insulated—will only exacerbate concerns about a captured press.⁶⁴

Murdoch likewise notes that the Founders, “also knew that the key to independence was to allow enterprises to prosper and serve as a counterweight to government power. It is precisely because newspapers make profits and do not depend on the government for their livelihood that they have the resources and wherewithal to hold the government accountable. This is also what builds the readers’ trust and confidence.”⁶⁵

Similarly, David Ignatius of *The Washington Post* argues:

I’m wary of... arguments for public support of U.S. news organizations in this time of financial trouble. I fear that would mean more “embedding” of government and the press at a time when we need less. American journalists need to protect their image of independence, at home and abroad; they need to reassure people that they have checked their personal baggage—national,

⁶² The term “Fourth Estate” is used generally now to refer to the press. Its origins are somewhat murky, but one of the earliest uses appeared in Thomas Carlyle’s *On Heroes and Hero Worship*: “Burke said there were Three Estates in parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.” Carlyle, Thomas, *Sartor Resartus & On Heroes and Hero Worship*, E. P. Dutton & Co. Inc. (1954) at 392 (Lecture V – “The Hero as a Man of Letters” (1840)). Coincidentally, in the very same lecture, Carlyle responded to suggestions that the literary, “thinking” class in his day needed taxpayer support: “One remark I must not omit, that royal or parliamentary grants of money are by no means the chief thing wanted! To give our Men of Letters stipends, endowments and all furtherance of cash, will do little towards the business. On the whole, one is weary of hearing about the omnipotence of money. I will say rather that, for a genuine man, it is no evil to be poor; that there ought to be Literary Men poor.” *Id.* at 392.

⁶³ Meredith Attwell Baker, *Hands Off the Journalist*, Remarks at the Media Institute, Jan. 21, 2010, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295867A1.pdf.

⁶⁴ *Id.*

⁶⁵ Murdoch, *supra* note 56 at 17-18.

ideological, cultural and religious—when they become journalists. Public subsidies make that harder.⁶⁶

We cannot make the point any better or any more clearly than these thoughtful observers. “Separation of Press and State” ought to be the watchwords of anyone interested in preserving public confidence in the media.

E. Media Bailouts or Massive Public Media Subsidies Will Be Expensive and Put Taxpayers at Risk

Few policymakers have thus far considered the potentially considerable costs associated with massive government intervention into media markets. A few academics and activist groups, however, have been willing to suggest what the price tag might entail.

The regulatory activist group, “Free Press,” and its founder, Robert W. McChesney, the prolific neo-Marxist media scholar who teaches at the University of Illinois at Urbana-Champaign, have offered up comparable blueprints for a massive infusion of government into the journalism profession.

For example, Free Press has called for a “National Journalism Strategy,” a veritable industrial policy for the press, based upon “the clear need for government action if a public good—public service journalism—is not delivered by the invisible hand of the market.”⁶⁷ Similarly, along with co-author John Nichols, McChesney writes in his new book, *The Death and Life of American Journalism*, that “if Americans want sufficient journalism to make our constitutional system work, it means we need a massive public intervention to produce a public good.”⁶⁸

True, information (including news and other forms of “content”) has “public good” characteristics that make it is very difficult (and occasionally impossible) for information-publishers to recoup their investments. In a world of media abundance, they quite literally lack pricing power: Whatever they charge, someone else will charge less for a close substitute, inevitably leading to “free” distribution of the content, even though the content is anything but free to produce. Of course, even if it is true that news (and entertainment programming, for that matter) bears some resemblance to a traditional public good, it does not necessarily follow that the State must or should fund it. This logical fallacy pervades the work of Free Press and those regulatory advocates, such as McChesney and Nichols, who argue for increased government intervention in the media marketplace. Indeed, the *entire history* of American media belies this thesis: Entertainment, journalistic, and informational media of all varieties have been funded primarily on a private, commercial basis for over 200 years—particularly based on advertising, which rewards publishers for attracting the attention of an audience.

⁶⁶ David Ignatius, *The Case for Spreading Press Freedom around the World*, WASHINGTON POST, Apr. 18, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041603994.html.

⁶⁷ Free Press, *Saving the News: Toward a National Journalism Strategy* (2009) at 9, www.freepress.net/files/saving_the_news.pdf.

⁶⁸ Robert W. McChesney & John Nichols, *THE DEATH AND LIFE OF AMERICAN JOURNALISM* (2010) at xii.

Unsurprisingly, however, once one embraces the notion that only the State can produce public goods, sweeping calls for government intervention inevitably follow. Free Press, for example, has proposed “a journalism jobs program to support veteran, qualified reporters and simultaneously to engage young people in journalism” that would be part of AmeriCorps.⁶⁹ Most of these ideas originate with McChesney and Nichols. Their book reads like a blueprint for government takeover of the press, and if they were honest with themselves and others, they would concede that to be the goal. They say, for instance, that:

the first order of business for those who would respond sufficiently to the current crisis is to stop the bleeding and keep as many journalists employed as possible. The United States needs to buy time to enact longer-term policies and subsidies. At the same time we must guard against squandering money on the failed firms and strategies of the past. In such a circumstance, the ideal programs are stopgap measures that can transition into long-term programs if they prove effective.⁷⁰

McChesney and Nichols rarely pause to consider the tension between their effort to “stop the bleeding and keep as many journalists employed as possible” and the need to “guard against squandering money on the failed firms and strategies of the past.” Instead, they breathlessly rush to devise a self-described “radical” agenda⁷¹ to create a “post-corporate”⁷² press system. That agenda is built around a \$35 billion/year “public works” program for the press, paid for by new taxes on consumer electronics, new taxes on broadband and mobile phone services, new taxes (called “fees”) on broadcast licensees, and new taxes on advertising.⁷³ They model their intervention after the Works Progress Administration (WPA) of the New Deal era. Their WPA for the press would include a “News AmeriCorps,”⁷⁴ a “Citizenship News Voucher,”⁷⁵ a generous expansion of postal subsidies,⁷⁶ a massive new subsidy for journalism schools,⁷⁷ and corporate welfare for newspapers sufficient to pay 50% of the salaries of all “journalistic employees” (up

⁶⁹ *Comments of Free Press In the Matter of News Media Workshops: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?* Federal Trade Commission, Project No. P091200, Nov. 6, 2009, at 19, www.ftc.gov/os/comments/newsmediaworkshop/544505-00027.pdf.

⁷⁰ McChesney & Nichols, *supra* note 68 at 168.

⁷¹ *Id.* at 3, 158, 165, 221.

⁷² *Id.* at 163.

⁷³ *Id.* at 210-11.

⁷⁴ *Id.* at 170.

⁷⁵ *Id.* at 201. For a critique, see Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *The Wrong Way to Reinvent Media, Part 3: Media Vouchers*, PFF Progress on Point 17.4, April 2010, www.pff.org/issues-pubs/pops/2010/pop17.4-media_vouchers.pdf.

⁷⁶ *Id.* at 168. For a critique, see Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *The Wrong Way to Reinvent Media, Part 4: Expanding Postal Subsidies*, PFF Progress on Point 17.5, April 2010, www.pff.org/issues-pubs/pops/2010/pop17.5-postal_subsidies.pdf.

⁷⁷ *Id.* at 170.

to a maximum of \$45,000 per journalist).⁷⁸ Some of these ideas are addressed and critiqued in more detail in Section V below.

Importantly, most of these federal handouts are subject to two caveats: To be eligible for support, media enterprises must reject or severely limit private support from advertising, and they must essentially waive the protection of the copyright laws for the content they produce. These twin caveats are an essential part of the effort to incentivize the movement toward a “post-corporate,” government-controlled, press.⁷⁹

Where will the money come from to fund these efforts? McChesney and Nichols take a fairly cavalier attitude about it: “The money must be spent and we will worry about where it comes from later.”⁸⁰ Such ‘we’re-all-dead-in-the-long-run’ reasoning seems lately to be the dominant philosophy in Washington policy circles. But the estimated \$35 billion per year price tag for their “public works” program for the press still should give us pause.

McChesney and Nichols offer several potential funding sources for their proposed program, most of which end up burdening commercial media providers in order to subsidize their noncommercial/public media competitors. For example, they advocate a four-part tax plan that would include:⁸¹

- a **5% tax on consumer electronics** (which they estimate would cost buyers in the aggregate \$4 billion/year);
- a **3% tax on monthly ISP & mobile service bills** (estimated to cost users \$6 billion/year);
- a **2% sales tax on advertising** (estimated to wring \$5 to \$6 billion/year out of the commercial economy); and
- a **7% tax on broadcasters** (estimated to sap another \$3-6 billion/year from an industry that is already reeling from the increased competition and dynamism of the new media marketplace).

Free Press has enthusiastically endorsed these proposals and offered very specific projections of how much revenue they would bring in for a “Public Media Trust Fund” in testimony at an FCC workshop related to this proceeding.⁸²

Generally speaking, McChesney, Nichols, and Free Press essentially advocate a radical form of media redistributionism—with struggling private entities and others being forced to fund public or non-commercial media outlets. That is, what these regulatory advocates seek is not so much a bailout for familiar private media that has so well served America for two centuries, but

⁷⁸ *Id.* at 188.

⁷⁹ McChesney & Nichols, *supra* note 68 at 163.

⁸⁰ *Id.* at 208.

⁸¹ *Id.* at 210-11.

⁸² Craig Aaron, Free Press, *Prepared Testimony for FCC Workshop on ‘Public And Other Noncommercial Media In The Digital Era’*, April 30, 2010, www.freepress.net/files/Craig_Aaron_FCC_Public_Media_Prepared_Testimony.pdf.

rather a massive wealth transfer from one class of speakers to another, with the stipulation—which they repeat numerous times—that state-subsidized entities are to forgo private advertising revenues, copyright protection and any affiliation with corporate parents. McChesney and Nichols argue:

We oppose bailouts or direct subsidies to existing commercial players, and we think a crucial policy objective is to convert these corporate newsrooms into viable post-corporate newsrooms. In the near-term, and in strictly controlled circumstances, arguments can be made for existing corporations getting some payoffs. These payoffs would come, however, in the form of severance packages; *i.e.*, the government might create incentives to get bad players off the field-by selling newspapers at fair (rather than inflated) prices to more responsible owners, unions or community groups—before their layoffs and cuts destroy what remains of American newsrooms. If the media corporations that did so much to create the crisis wish to remain in the journalism business, more power to them. But they will not do so on the government dole.⁸³

Thus, they plan to channel taxpayer support to the media entities that *they* favor without having government directly picking winners and losers. In essence, if subsidies are limited to only those media entities that will forgo advertising revenues and copyright protection, then their call for a new “post-corporate” / “public media” system becomes a self-fulfilling prophecy.

This should be profoundly troubling to anyone who cares about fundamental freedoms, neutral principles of the rule of law, and essential fairness in public administration. McChesney, Nichols, and Free Press are out to destroy the private provision of media in America, and they don’t cloak that purpose. In fact, McChesney has elsewhere made his “radical” intentions perfectly clear. During an interview with the Canadian-based “Socialist Project”) McChesney confessed that “*the ultimate goal is to get rid of the media capitalists,*” and noted that, “*unless you make significant changes in the media, it will be vastly more difficult to have a revolution.*”⁸⁴ Similarly, in his book with Nichols, he concludes by noting that “We have responded in a time of crisis not with tinkering reforms but with revolution.”⁸⁵ An opportunity for “revolution” indeed! Free Press has used similar rhetoric, insisting that “We have a crisis. We have an historic opportunity. We can’t let either go to waste.”⁸⁶

Such radicalism must be rejected if we hope to sustain a truly free press and uphold America’s proud tradition of keeping a high and tight wall of separation between Press and State. Americans would do well to remember the (other) Golden Rule: “Whoever Has the Gold, Makes

⁸³ McChesney & Nichols, *supra* note 68 at 163.

⁸⁴ Socialist Project, *Media Capitalism, the State and 21st Century Media Democracy Struggles: An Interview with Robert McChesney*, THE BULLET, Socialist Project, E-Bulletin No. 246, Aug. 9, 2009, www.socialistproject.ca/bullet/246.php.

⁸⁵ McChesney & Nichols, *supra* note 68 at 229.

⁸⁶ Craig Aaron, *supra* note 82 at 8.

the Rules!”⁸⁷ The more control politicians have over the media business vis-à-vis the provision of direct and indirect support, the more control they will inevitably have over media itself.

F. There is Risk That the State Will Subsidize Failure & Encourage Industrial Protectionism

Murdoch rightly notes that “the most damning problem with government ‘help’ is [that it] props up those who are producing things that customers do not want. In other words, it subsidizes the failures and penalizes the successes.”⁸⁸ McChesney and Nichols at least acknowledge this difficulty when noting that “we must guard again squandering money on the failed firms and strategies of the past.”⁸⁹ Apparently, though, their concerns about throwing money at failing business models are trumped by an ideology that prefers state subsidization of the press, including “failed firms” (again, so long as those firms renounce all ties to private, for-profit owners and business models).

The political climate for wanton government spending on causes of marginal public benefit is rapidly turning sour. When the treasury is flush and the economic outlook sunny, one might be excused for promoting short-term subsidies to bailout entrenched, but failing, firms. There is no excuse for such bailouts, however, when the federal deficit is ballooning out of control, unemployment is at or near double digits, and the tax base is reeling under the pressure of large, new spending initiatives.

It is sometimes difficult to accept that markets work by destroying business models whose time has passed. In fact, however, the destructive aspect of any service or product innovation is necessary for the new, better ways of doing business to thrive. As the great economist Joseph Schumpeter wrote:

The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers, goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates.... [I]ndustrial mutation... incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.⁹⁰

Whatever the new media models are going to be, they will never come to fruition if government funds are used to prop up old, now defunct, models.

⁸⁷ The Big Apple, *Golden Rule* (“He Who Has the Gold Makes the Rules”), June 13, 2009, www.barrypopik.com/index.php/new_york_city/entry/golden_rule_he_who_has_the_gold_makes_the_rules.

⁸⁸ Murdoch, *supra* note 56 at 17-18.

⁸⁹ McChesney & Nichols, *supra* note 68 at 168.

⁹⁰ Joseph Schumpeter, *CAPITALISM, SOCIALISM AND DEMOCRACY* at 82-85 (Harper 1975) (1942).

G. Government Should Not Force Taxpayers to Subsidize Things They Might Not Want or Find Offensive

Finally, a significant expansion in public support for media would also raise fairness questions from the perspective of individual taxpayers. Forcing citizens to fund media content they find objectionable will likely lead to controversy and public tensions. Randy May notes that:

when government-supported media—that is, media supported with our tax dollars—decide what content should be filtered or amplified regarding issues of public importance... government’s involvement tends to exacerbate public tensions in a way that makes civil discourse more difficult. This is because government content decisions are seen by many as tilting the public policy playing field in a way inconsistent with their beliefs.⁹¹

Should liberals be forced to help fund the next Fox News or Rush Limbaugh? Should conservatives have to support Keith Olbermann or Bill Moyers? Should independents or libertarians have to subsidize either side? As Thomas Jefferson famously put it in the 1786 Virginia Act for Establishing Religious Freedom, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”⁹² That is, we naturally—and rightly—resent subsidizing speech that is antithetical to our own values.

In a sense, this fight has always been with us in the debates over funding of National Public Radio and the Public Broadcast Service. But the narrow, targeted subsidies of the past that McChesney and Nichols cite as precedents for their sweeping proposals (*e.g.*, postal subsidies⁹³) were subtle and small enough that they could operate without generating public outrage. By contrast, the scale of the intervention and subsidization being envisioned by McChesney, Nichols, Free Press and their ilk would likely bring fights over compulsory funding to the center of the political discourse. Indeed, a massive infusion of state meddling in media markets likely will raise the stakes in this already heated debate. Below we discuss in detail the political discord sure to be created by forcing Americans to subsidize the news sources preferred by others, how this would make the imposition of strings politically inevitable, and yet how such strings would likely be ruled unconstitutional anyway. In particular, we discuss what we call the “Political/Constitutional Paradox”: What’s politically feasible (subsidies with strings) is unconstitutional and what’s constitutional (the kinds of broad subsidies McChesney and Nichols insist we must all learn to accept) is politically impossible.

Finally, practically speaking, it simply isn’t possible to make consumers “eat their (media) greens” and pay attention to the “right” media in an age of information abundance.⁹⁴ With so

⁹¹ Randolph J. May, The Free State Foundation, *Prepared Statement for Second Future of Media Workshop on Public and Other Noncommercial Media in the Digital Age*, Federal Communications Commission, April 30, 2010, at 2, http://freestatefoundation.org/images/Prepared_Statement_of_Randolph_May_-_Second_Workshop.pdf

⁹² <http://religiousfreedom.lib.virginia.edu/sacred/vaact.html>

⁹³ See *infra* Section V.F.

⁹⁴ Adam Thierer, The Progress & Freedom Foundation, *Why Expansion of the FCC’s Public Interest Regulatory Regime is Unwise, Unneeded, Unconstitutional, and Unenforceable*, Testimony Before the Federal

many voices competing for our attention, it's impossible make people watch, listen, or read things they don't want to. That's especially true with "hard news" that many policymakers might look to subsidize, which has never netted major ratings. As Ellen P. Goodman of the Rutgers-Camden School of Law has noted: "Given the proliferation of consumer filtering and choice, these kinds of interventions are of questionable efficacy. Consumers equipped with digital selection and filtering tools are likely to avoid content they do not demand no matter what the regulatory efforts to force exposure."⁹⁵ As Goodman rightly argues, "regulation cannot, in a liberal democracy, force viewers to consume media products they do not think they want in the name of the public interest."⁹⁶

There's no reason to believe this situation has ever been different or will ever change. For example, writing in 1922, famed journalist Walter Lippmann noted that, "it is possible to make a rough estimate only of the amount of attention people give each day to informing themselves about public affairs," but "the time each day is small when any of us is directly exposed to information from our unseen environment."⁹⁷ The fact remains constant: "Viewers vary in the degree that they want to know about the details of politics and government," argues Hamilton.⁹⁸

III. NEW OR EXPANDED "PUBLIC INTEREST" REGULATORY OBLIGATIONS WON'T MAKE MEDIA REINVENTION ANY EASIER

Probably the best way government can help media or "save journalism" is simply by getting out of the way. The Commission's current regulatory regime for media does the opposite: It suffocates many traditional operators with red tape at every juncture.

In particular, broadcasters remain subject to a wide variety of regulations: ownership caps, market limitations, "localism" requirements, educational programming mandates, advertising restrictions, political airtime and advertising rules, speech controls, and other "public interest" mandates. These rules, most of which long ago outlived their usefulness, limit the ability of regulated entities to respond to the rapidly changing market environment. Worse yet, these rules are applied in a remarkably arbitrary fashion, with some sectors and firms being singled out for harsher regulatory treatment than others. Finally, what's more troubling is that in each of these areas the Commission is considering *expanding* regulatory burdens on many fronts, which would make media reinvention efforts even more challenging.

Communications Commission Hearing on "Serving the Public Interest in the Digital Era," March 4, 2010, www.pff.org/issues-pubs/testimony/2010/2010-03-04-Thierer_Remarks_at_FCC_Hearing.pdf.

⁹⁵ Ellen P. Goodman, "Proactive Media Policy in an Age of Content Abundance," in Philip M. Napoli, ed., *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* (2007) at 370, 374.

⁹⁶ *Id.*

⁹⁷ Walter Lippmann, *PUBLIC OPINION* (1922), at 53, 57.

⁹⁸ Hamilton, *supra* note 47 at 14.

A. The Inherent Ambiguity of “the Public Interest” Notion

The normative case against expansion of public interest regulation begins with the fact that this notion has always been haunted by an inherent ambiguity that is fundamentally at odds with America’s First Amendment traditions. Indeed, while public interest regulation has been considered the cornerstone of communications and media policy since the 1930s, at no time during these seven decades has the term been adequately defined.

Former FCC Commissioner and long-time University of Virginia law professor Glen Robinson has argued that the public interest standard “is vague to the point of vacuousness, providing neither guidance nor constraint on the agency’s action.”⁹⁹ And Nobel Prize-winning economist Ronald Coase argued 50 years ago that, “The phrase... lacks any definite meaning. Furthermore, the many inconsistencies in commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation.”¹⁰⁰

And that is still true today. Simply put, the public interest *standard* is not really a “standard” at all since it has no fixed meaning; the definition of the phrase has shifted with the political winds to suit the whims of those in power at any given time.

B. When Does Regulating “in the Public Interest” Devolve into Blatant Elitism?

Still, many policymakers continue to prop up public interest notions and regulations in the belief that they are directing the content or character of media toward a nobler end. At times, their rhetoric takes on a fairy-tale quality as lawmakers and regulators speak of the public interest in reverential and fantastic terms, again, all the while deftly evading any attempt to define the term.

But the fundamental problem here is that public interest proponents assume that *their* values or objectives—which, in their opinion, are consistent with the needs and desires of the public—should ultimately triumph within the public policy arena. Simply stated, what motivates much public interest regulation is a simple desire by some policymakers¹⁰¹ or ivory tower academics

⁹⁹ Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 14 (Max D. Paglin ed., 1989). Likewise, Lawrence J. White has noted that, “The ‘public interest’ is a vague, ill-defined concept. Under the ‘public interest’ banner the Congress and the FCC have established far too many protectionist, anticompetitive, anti-innovative, inflexible, output-limiting regulatory regimes and have unnecessarily infringed on the First Amendment rights of broadcasters.” See Lawrence J. White, *Spectrum for Sale*, THE MILKEN INSTITUTE REVIEW (June 2001) at 38. See also William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY LAW JOURNAL 715, 716 (1989).

¹⁰⁰ Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1, 8–9 (1959). Even supporters of broadcast regulation such as Paul Taylor and Norman Ornstein admit that, “neither in the 1927 [Radio] Act nor in the 1934 [Communications] Act, nor subsequently, did Congress define clearly what actions by broadcasters would represent managing their stations in the public interest.” Paul Taylor & Norman Ornstein, New America Foundation, *A Broadcast Spectrum Fee for Campaign Finance Reform*, Spectrum Series Working Paper No. 4, (2002) at 6.

¹⁰¹ See, e.g., Newton Minow, *Television and the Public Interest*, Speech to the National Association of Broadcasters, May 9, 1961, www.americanrhetoric.com/speeches/newtonminow.htm (“Some say the public interest is merely what interests the public. I disagree... I do not accept the idea that the present over-all

to tell the American people what's best for them. For example, Cass Sunstein has argued that there "is a large difference between the public interest and what interests the public."¹⁰² Unsurprisingly, he and many other scholars go on to claim that *they* have a better idea of what interests the public.¹⁰³ In other words, the public doesn't know what's best for them, so someone else must tell them—and potentially even *force* supposedly better choices upon them. For example, Goodman believes that, "a proactive media policy must not only correct a poorly functioning market, but also provide diversions around existing media markets and tastes. Proactive media policy can do this by changing consumer wants."¹⁰⁴

But, again, *according to who's tastes and values?* In practice, how the "public interest" has been interpreted and applied by the FCC has often depended on the ideological disposition of whatever party is in charge at the time. As Ford Rowan, author of *Broadcast Fairness*, once noted: "Many liberals want regulation to make broadcasting do wonderful things; many conservatives want regulation to restrain broadcasting from doing terrible things."¹⁰⁵ Consequently, during periods of liberal rule, "the public interest" has been seen as a method of politically engineering more "educational" and "community-based" programming. By contrast, in the hands of conservative appointees, "the public interest" has been seen as an instrument to curb "indecent" speech.

This is how the mantra of the "public interest" devolves into blatant, politically-enforced elitism.¹⁰⁶ What else should we call it when a five unelected officials at the FCC sit in judgment of acceptable media content and dictate media marketplace outcomes? The viewing and listening public has a broad array of interests and desires that cannot be easily gauged by the Commission. As media scholar Benjamin Compaine has correctly noted, "[i]n democracies, there is no universal 'public interest.' Rather there are numerous and changing 'interested

programming is aimed accurately at the public taste."); *Statement of Michael J. Copps before the Senate Committee on Commerce, Science, and Transportation*, Jan. 14, 2003, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230241A4.doc.

¹⁰² Cass Sunstein, *Television and the Public Interest*, 88 CALIFORNIA LAW REVIEW 499, 501 (2000).

¹⁰³ See generally, David Croteau and William Hoynes, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* (2001); David Bollier, Aspen Institute, *In Search of the Public Interest in the New Media Environment*, A Report of the Aspen Institute Forum on Communications and Society (2002), www.aspeninstitute.org/publications/search-public-interest-new-media-environment; *Charting the Digital Broadcasting Future*, Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Dec. 18, 1998, www.ntia.doc.gov/pubintadvcom/piacreport.pdf.

¹⁰⁴ Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECHNOLOGY LAW JOURNAL 1389, 1419 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590425.

¹⁰⁵ Ford Rowan, *BROADCAST FAIRNESS* (Longham, 1984), p. 39.

¹⁰⁶ See Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *What Unites Advocates of Speech Controls & Privacy Regulation?*, PFF PROGRESS ON POINT 16.19, Aug. 11, 2009, www.pff.org/issues-pubs/pops/2009/pop16.19-unites-speech-and-privacy-reg-advocates.pdf. On occasion, even public interest regulatory advocates have admitted this. "One of the dangers in evaluating the media in a public interest framework is that it can easily take on an elitist tone." David Croteau and William Hoynes, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* (2001) at 151.

publics.”¹⁰⁷ “Discussions of media policy often take place on a plane of high abstraction,” says Hamilton. “Yet outcomes in media markets are really only the aggregation of millions of decisions by individuals about what to read and consume.”¹⁰⁸

Perhaps what some are afraid to ask is this: *Does the public really want to watch what some policymakers and regulatory advocates consider to be more “culturally enriching” or “civic-minded” content, or would they rather tune into something else?* Given the choice, many viewers will opt for what many public interest regulatory supporters would consider to be “low-brow” offerings over the content that policymakers feel the masses should be consuming. Public interest supporters may bemoan the lack of civic spirit, or claim that this represents the end of our culture as we know it, but these are voluntary choices made by the citizenry that must be respected by government officials. In particular, government should not censor Americans’ choice of content through open-ended public interest regulatory rationales.¹⁰⁹

C. There’s More “Public Interest” Content than Ever Before

Regardless, viewers and listeners are being offered a stunning array of diverse media inputs and options. Just because the American people sometimes make choices that policymakers find distasteful, it does *not* mean that citizens don’t have plenty of good choices at their disposal. For example, we are blessed to be living in a veritable “golden age” of children’s video programming.¹¹⁰ As documented in PFF’s ongoing special report on *Parental Controls & Online Child Protection*¹¹¹ and in other filings to the Commission,¹¹² there’s never been more educational and enriching programming available to families than there is today. Similarly, consider the stunning diversity of programming available thanks to the 500-plus channel

¹⁰⁷ Benjamin M. Compaine, *The Myths of Encroaching Global Media Ownership*, OPEN DEMOCRACY.NET, Nov. 6, 2001, at 5, www.opendemocracy.net/content/articles/PDF/87.pdf

¹⁰⁸ Hamilton, *supra* note 47 at 263.

¹⁰⁹ See Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, JOURNAL OF LAW & ECONOMICS 15, 19 (1967) (“The mandate to grant licenses that serve the public [interest]... does not constitute the FCC the moral proctor of the public or the den mother of the audience.”)

¹¹⁰ Adam Thierer, The Progress & Freedom Foundation, *We Are Living in the Golden Age of Children’s Programming*, PFF PROGRESS SNAPSHOT 5.6, July 2009, www.pff.org/issues-pubs/ps/2009/pdf/ps5.6-childrens-television-golden-age.pdf.

¹¹¹ Adam Thierer, The Progress & Freedom Foundation, PARENTAL CONTROLS AND ONLINE CHILD PROTECTION: A SURVEY OF TOOLS AND METHODS, Version 4.0 (2008), www.pff.org/parentalcontrols.

¹¹² *Comments of The Progress & Freedom Foundation and the Electronic Frontier Foundation In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape*, Federal Communications Commission, MB Docket No. 09-194, Feb 24, 2010, www.pff.org/issues-pubs/filings/2010/2010-02-24-PFF-EFF_Response_to_FCC_Empowering_Parents_Protecting_Children_NOI_MB_09-194.pdf; Adam Thierer, The Progress & Freedom Foundation, *Comments in the Matter of Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, Federal Communications Commission, MB Docket No. 09-26, April 15, 2009, www.pff.org/issues-pubs/filings/2009/041509-%5BFCC-FILING%5D-Adam-Thierer-PFF-re-FCC-Child-Safe-Viewing-Act-NOI-%28MB-09-26%29.pdf.

universe of multichannel video options now at our disposal.¹¹³ Almost every conceivable interest or hobby is now covered by a video network.¹¹⁴

Exhibit 2: Cable and Satellite TV Networks by Genre

News: CNN, Fox News, MSNBC, C-Span, C-Span 2, C-Span 3, BBC America, ABC News Now, CNN International

Sports: ESPN, ESPN 2, ESPN News, ESPN Classics, Fox Sports, TNT, NBA TV, NFL Network, Golf Channel, Tennis Channel, Speed Channel, Outdoor Life Network, Fuel

Weather: The Weather Channel, Weatherscan

Home Renovation: Home & Garden Television, The Learning Channel, DIY, Style

Educational / Informational / Travel: History Channel, Biography Channel (A&E), Learning Channel (TLC), Discovery Channel, National Geographic Channel, Animal Planet, Travel Channel

Financial: CNNfn, CNBC, Fox Business Network, Bloomberg Television

Female-oriented: WE (Women's Entertainment), Oxygen, Lifetime Television, Lifetime Real Women, Lifetime Movie Network, Showtime Women, SoapNet

Family / Children-Oriented: Animal Planet, Anime Network, ABC Family, Black Family Channel, Boomerang, Cartoon Network, Discovery Kids, Disney Channel, Familyland Television Network, FUNimation, Hallmark Channel, Hallmark Movie Channel, HBO Family, KTV – Kids and Teens Television, Nickelodeon, Nick 2, Nick Toons, Noggin (ages 2-5), The N Channel (ages 9-14), PBS Kids Sprout, Showtime Family Zone, Starz! Kids & Family, Toon Disney, Varsity TV, WAM (movies for ages 8-16), American Life TV, Family Net

African-American: BET, Black Starz! Black Family Channel, BET Gospel

Foreign / Foreign Language: Telemundo (Spanish), Univision (Spanish), Deutsche Welle (German), BBC America (British), AIT: African Independent Television, TV Asia, ZEE-TV Asia (South Asia) ART: Arab Radio and Television, CCTV-4: China Central Television, The Filipino Channel (Philippines), Saigon Broadcasting Network (Vietnam), Channel One Russian Worldwide Network, The International Channel, HBO Latino, History Channel en Espanol

Religious: Trinity Broadcasting Network, The Church Channel (TBN), World Harvest Television, Eternal Word Television Network (EWTN), National Jewish Television, Worship Network

Music: MTV, MTV 2, MTV Jams, MTV Hits, VH1, VH1 Classic, VH1 Megahits, VH1 Soul, VH1 Country, Fuse, Country Music Television (CMT)

Movies: HBO, Showtime, Cinemax, Starz, Encore, The Movie Channel, Turner Classic Movies, AMC, IFC, Flix, Sundance, Bravo (Action, Westerns, Mystery, Love Stories, etc.)

Other or General-Interest Programming: TBS, USA Network, TNT, FX, SciFi Channel, Spike TV, truTV, Slueth, Crime & Investigation Network, Wealth TV, TV One

Source: Federal Communications Commission, various *Annual Video Competition Reports*; NCTA

¹¹³ The number of pay TV channels available has skyrocketed from just 70 in 1990 to 565 in 2006, the last year for which the FCC has released data. Federal Communications Commission, *Thirteenth Annual Video Competition Report*, MB Docket No. 06-189, Nov. 27, 2007, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf.

¹¹⁴ For an up-to-date list, see National Cable & Telecommunications Association, *Cable Networks*, www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907.

And is there really any shortage political programming or “civic-minded” content from which to choose? C-SPAN alone covers more activity in the course of a week than most of us probably came into contact with in our entire lives just 30 years ago. Consider these data points.¹¹⁵ In the 2009 calendar year, C-SPAN provided the following amount of first run programming across their three channels:

- 8,438 overall hours of programming;
- 2,709 hours of House & Senate floor activity; and,
- 1,222 hours of House & Senate committee hearings.

Moreover, C-SPAN recently created the C-SPAN Video Library,¹¹⁶ which archives 23 years worth (1987-on) of fully searchable (and free) video content, including:

- 161,000 overall hours of programming;
- 56,600 hours of House & Senate floor activity; and,
- 20,152 of House & Senate committee hearings.

Importantly, many people fail to realize that C-SPAN is a private, non-profit company that is provided as a public service by cable industry contributions. It receives no government or taxpayer contributions. From 1979 to 2009, total license fees paid by cable & satellite companies to support C-SPAN totaled \$922 million.¹¹⁷

And let’s not forget about what the Internet has made available to us. It has given us unprecedented access to public affairs information—local, state, national, and international.

D. Returning to First Principles

Yet, we now face the prospect of this arbitrary regulatory regime being expanding to cover more speech and speech platforms. Instead of first looking to expand regulation, we should use this as an opportunity to return to first principles—especially in light of the dubious constitutionality of the FCC’s existing public interest regulatory regime.¹¹⁸

We should begin by recalling that, from the time of the republic’s founding, public interest regulation has *never* been applied to newspapers, magazines, pamphlets, or books. Instead, the First Amendment has reigned supreme.¹¹⁹ And when policymakers attempted to apply such public interest obligations to print media, those edicts were ruled flatly unconstitutional.¹²⁰

¹¹⁵ All C-SPAN data confirmed by Peter Kiley, Vice President, C-SPAN Networks. See also C-SPAN, *Marking 30 Years. Covering Washington Like No Other*, www.c-span.org/30Years/default.aspx.

¹¹⁶ www.c-spanvideo.org/videoLibrary

¹¹⁷ *Supra* note 115.

¹¹⁸ See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?* 53 FEDERAL COMMUNICATIONS LAW JOURNAL 427-68 (May 2001), www.law.indiana.edu/fclj/pubs/v53/no3/may.pdf.

¹¹⁹ Jonathan Emord, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT (1991).

¹²⁰ *Miami Herald v. Tornillo*, 418 U.S. 241(1974).

The characteristics of broadcast radio and television, however, were considered sufficiently unique to justify a different regulatory approach and second-class citizenship status in terms of First Amendment rights. Scarcity, of course, was the lynchpin of the regulatory regime imposed on the broadcast industry, and it yielded calls for public interest regulation of the medium. But whatever one thinks of the scarcity rationale for differential treatment of broadcasting—and we do not believe it was ever a legitimate excuse for diminished First Amendment treatment—that era of scarcity is clearly over.¹²¹ We now live in an age of information abundance—possibly even “information overload.”¹²² We have more media options and diversity at our disposal today than ever before, and generally at falling prices.¹²³ And yet, at the Commission, it continues to be business as usual.

The courts, however, *have* acknowledged that the situation on the ground has changed, and changed radically. When policymakers have sought to expand broadcast-like regulatory requirements to newer media platforms in recent years, the Courts have pushed back. That has particularly been the case for the Internet¹²⁴ and video game content.¹²⁵ The jurisprudential Twilight Zone will live in today—in which we classify services and determine free speech rights based on technical characteristics or functional features—makes no sense and can’t last for much longer in light of the tectonic shifts taking place in the modern media marketplace.¹²⁶

¹²¹ Even FCC officials have acknowledged this. See John W. Berresford, Federal Communications Commission, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, FCC MEDIA BUREAU STAFF RESEARCH PAPER No. 2005-2, (March 2005) www.fcc.gov/ownership/materials/already-released/scarcity030005.pdf. Berresford refers to the scarcity rationale as “outmoded,” “based on fundamental misunderstandings of physics and economics,” and “no longer valid.”

¹²² See Adam Thierer & Grant Eskelsen, The Progress & Freedom Foundation, *Media Metrics: The True State of the Modern Media Marketplace* (Summer 2008), www.pff.org/mediametrics; Adam Thierer, *The Media Cornucopia*, 17 CITY JOURNAL 2 (Spring 2007) at 84-89, www.city-journal.org/html/17_2_media.html.

¹²³ See Benjamin M. Compaine, *The Media Monopoly Myth: How New Competition is Expanding Our Sources of Information and Entertainment*, New Millennium Research Council (2005) www.newmillenniumresearch.org/archive/Final_Compaine_Paper_050205.pdf.

¹²⁴ *Reno v. American Civil Liberties Union*, 521 US 844, 874 (1997); *American Civil Liberties Union v. Gonzales*, 478 F.Supp.2d 775, 795 (E.D.Pa. 2007).

¹²⁵ See, e.g., *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950, 965-967 (9th Cir. 2009); *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006); *Interactive Digital Software Association, et. al. v. St. Louis County, et. al.*, 329 F.3d 954 (8 Cir. 2003); *American Amusement Machine Association, et al. v. Kendrick, et al.*, 244 F.3d 572 (7th Cir. 2001); *Entertainment Software Ass’n v. Granholm*, 426 F Supp 2d 646 (E.D. Mich. 2006); *Video Software Dealers Association, et. al. v. Maleng, et. al.*, 325 F. Supp.2d 1180 (W.D. Wa. 2004). See generally Adam Thierer, The Progress & Freedom Foundation, *Fact and Fiction in the Debate Over Video Game Regulation*, PROGRESS ON POINT 13.7, March 2006, at 13-18 www.pff.org/issues-pubs/pops/pop13.7videogames.pdf (discussing cases striking down state video game laws); Henry Cohen, *Constitutionality of Proposals to Prohibit the Sale or Rental to Minors of Video Games with Violent or Sexual Content or Strong Language*, Congressional Research Service, U.S. Library of Congress (Jan. 12, 2006), http://digital.library.unt.edu/ark:/67531/metacrs9144/m1/1/high_res_d/.

¹²⁶ Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, Catholic University Law School, 15 COMMLAW CONSPPECTUS (Summer 2007) at 431-482; http://commlaw.cua.edu/articles/v15/15_2/Thierer.pdf. Randy May has referred to these artificial distinctions as “techno-functional constructs.” Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, ENGAGE (Oct. 2008) at 109.

Simply put, the sheer scale and volume of media activity taking place across an unprecedented variety of communications platforms makes it difficult to imagine how a scarcity-era regulatory regime will be applied going forward.

IV. NEW RESTRICTIONS ON ADVERTISING COULD THREATEN THE VIABILITY OF MEDIA PROVIDERS & THE PROVISION OF NEWS IN PARTICULAR

A. The Centrality of Advertising to Sustaining Media & News In Particular

The centrality of advertising to the development and dissemination of media content and services cannot be overstated. In essence, users “pay” for content by seeing ads. Indeed, ads have long funded the costs of generating content for radio, television, and newspapers (with subscriptions paying only for distribution).

Advertising support has been especially important to the production of news media, because it has helped fund journalism and kept it free from governmental or special interest pressures. But funding “hard news” in particular has always been challenging. Financing a team of dedicated local beat reporters, investigative journalists, national desks, foreign bureaus, and all the associated production facilities and support staff is an extremely expensive undertaking.¹²⁷ And, for all that trouble and expense, hard news rarely turns a healthy profit. Often it has been considered a “loss leader” for media companies and has been cross-subsidized by other types of content or services.¹²⁸ This is why “bundling” has been such a popular model for many media operations such as newspapers, magazines, and cable television. By tying news production to other types of content or services, media operators have been able to sustain the production of hard news, despite its general unprofitability.

It’s worth recalling that a business model to sustain hard news production and dissemination on a mass scale really only developed mid-way through our Republic. The early history of media in this country was characterized by the “partisan press” due to the heavy reliance on a patronage model and direct association with political parties and figures.¹²⁹ This changed with the rise of large daily newspapers in the mid-1800s and then broadcast radio and television in the early half of the 20th century.¹³⁰ Media providers were able to cross-subsidize news production

¹²⁷ Alex S. Jones notes that, “Until now, the iron core of news has been somewhat sheltered by an economic model that was able to provide extra resources beyond what readers—and advertisers—would financially support. This kind of news is expensive to produce, especially investigative reporting.” Jones, *supra* note 41 at 4.

¹²⁸ “For a long time, publishers have used news as a ‘loss leader,’ a product sold below costs to create other sales.” The Media Consortium, *The Big Thaw: Charting a New Future for Journalism*, July 2009, at 36, www.themediaconsortium.org/thebigthaw.

¹²⁹ Alex Jones notes that in the early history of the republic, “most newspaper revenue had been from subscriptions and circulation or outright subsidy by political parties or other interest groups. Advertising had provided only marginal additional money. In the new model, advertising was the main source of revenue, and the potential for a bounty from advertising was expanding along with the American economy.” Jones, *supra* note 41 at 136.

¹³⁰ James T. Hamilton notes that, “nonpartisan reporting emerged as a commercial product in American newspaper markets in the 1870s. Before that time, many papers openly proclaimed association with a particular political party.” James T. Hamilton, *ALL THE NEWS THAT’S FIT TO SELL* (2004), at 3.

independent of private or political patronage thanks to three things: (1) high-speed printing presses or broadcast facilities, (2) geographic-based market and pricing power, and (3) the widespread advertising base that was made possible by (1) and (2).

This helps explain why advertising is so important. In essence, it is the hidden, unappreciated benefactor that sustains a free press and media more generally.¹³¹ Consider the comments of leading media economists and analysts:

- “Advertising is the mother’s milk of all the mass media. Without ads, most editorial products and other programming would be either unavailable or prohibitively expensive.” — Walt Mossberg, *Wall Street Journal* technology columnist.¹³²
- “Advertising has become the financial lifeblood of publications, broadcasts, and American civilization.” — Anthony R. Fellow, author, *American Media History*.¹³³
- “Advertisers are critical to the success of commercial media because they provide the primary revenue stream that keeps most of them viable.” — Robert G. Picard, *The Economics and Financing of Media Companies*.¹³⁴
- “Newspapers, magazines, radio, television, and many websites all receive their primary income from advertising.” — William F. Arens, author, *Contemporary Advertising*.¹³⁵
- “Advertising is the key common ingredient in the tactics and strategies of all entertainment and media company business models. Indeed, it might further be said that advertising has substantively subsidized the production and delivery of news and entertainment throughout the last century.” — Harold L. Vogel, author, *Entertainment Industry Economics*.¹³⁶
- “Advertising plays a particularly strong role in supporting media in the United States. Advertising revenues pay for virtually all broadcast media, 70% to 80% of support newspapers and an equally high percentage for magazines.” — Mary Alice Shaver, University of Central Florida.¹³⁷

These observations are even more relevant today since advertising is proving to be the only media industry business model with any real staying power—particularly in the era of “free”

¹³¹ Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *The Hidden Benefactor: How Advertising Informs, Educates & Benefits Consumers*, PFF PROGRESS ON POINT 6.5, Feb. 2010, www.pff.org/issues-pubs/ps/2010/ps6.5-the-hidden-benefactor.html.

¹³² Walt Mossberg, *Now You See ‘Em...*, SMARTMONEY.COM, June 15, 2000, www.sartmoney.com/mossberg/index.cfm?story=20000615

¹³³ Anthony R. Fellow, *AMERICAN MEDIA HISTORY* (2005) at 314.

¹³⁴ Robert G. Picard, *THE ECONOMICS AND FINANCING OF MEDIA COMPANIES* (2002) at 122.

¹³⁵ William F. Arens, *CONTEMPORARY ADVERTISING* (McGraw-Hill Irwin, 10th Ed., 2006) at 50.

¹³⁶ Harold L. Vogel, *ENTERTAINMENT INDUSTRY ECONOMICS* (Cambridge, MA: Cambridge University Press, 7th Edition, 2007), p. 46.

¹³⁷ Mary Alice Shaver, *The Economics of the Advertising Industry*, in Alison Alexander, et. al. eds., *MEDIA ECONOMICS: THEORY AND PRACTICE* (Lawrence Erlbaum Associates, Third Edition, 2004) at 250.

online content and services.¹³⁸ The basic reason is simple economics: In intensely competitive markets, prices tend to fall to the marginal cost of production and the marginal cost of producing pure information is close to zero. On the Internet, distribution is almost costless and the marginal cost of additional units of content is thus even closer to zero, thus bearing economic theory out in full:

1. Producing the first unit of content (*e.g.*, a news story or video) remains costly, so while the *marginal* cost of every additional unit is essentially zero, *average* cost is not.
2. The failure of micropayments online thus far suggests that, no matter how low the technological transaction costs are, the mental transaction costs involved combined with even tiny payments could exceed the perceived value of most content for many consumers.
3. The world of media scarcity in which consumers could choose from only a few sources of news and entertainment has given way to a world of staggering media abundance and the choices of users are no longer constrained by the tyranny of physical limitations like distance and printing costs.
4. Because pure information cannot be copyrighted (and fair use allows significant referencing and quotation), very little content is so unique that users cannot find a ready substitute elsewhere if a site (or even cartel of sites) attempted to charge.

This is why advertising is even *more* important to the future of media today. Consequently, *the overall health of modern media marketplace, the Internet economy, and the aggregate amount of information and speech that can be supported are fundamentally tied up with the question of whether we allow the advertising marketplace to evolve in an efficient, dynamic fashion.* Heavy-handed regulation could kill the goose that lays the golden eggs.

And, to reiterate another under-appreciated point: Private advertising promotes press independence. As Arens rightly notes, “[advertising] facilitates freedom of the press and promotes more complete information.”¹³⁹ Why? Because, contrary to what some critics claim, advertising and marketing help keep private media providers independent of the need for taxpayer subsidies or private patrons. Again, advertising helped liberate media operators from both public and private patronage and influence, and rewarded them for attracting eyeballs. Commenting on the importance of advertising to journalism legends such as Joseph Pulitzer and William Allen White, Paul Starr, author of *The Creation of the Media*, says that “just as abundant advertising gave Pulitzer the independence to criticize corporate as well as government abuses, so it gave White the material basis for his editorial independence.”¹⁴⁰ Starr concludes that, for newspaper providers large and small alike, “the increasingly strong

¹³⁸ See, *e.g.*, Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *Chairman Leibowitz’s Disconnect on Privacy Regulation & the Future of News*, PFF PROGRESS SNAPSHOT 6.1, January 2010, www.pff.org/issues-pubs/ps/2010/pdf/ps6.1-Leibowitz-disconnect-on-privacy-and-advertising.pdf.

¹³⁹ Arens, *supra* note 135 at 50.

¹⁴⁰ Paul Starr, *THE CREATION OF MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATION* (2004) at 263-4.

commercial foundation of journalism became a basis of independent power and influence, locally as well as nationally.”¹⁴¹

This brief historical and economic overview illustrates why advertising has been so essential to sustaining a free and independent press, which indirectly benefits citizens by ensuring that they have diverse informational inputs at their disposal. It also begs a profound question: *If not advertising, then what else will sustain media?*

B. An Attack on Advertising is Tantamount to an Attack on Media Itself

Thus, with competition intensifying and audiences fragmenting, crippling the advertising market is the last thing we should be doing. And, yet, there are a plethora of new regulatory proposals pending now that would do exactly that. Indeed, there are many fronts in Washington’s new war on advertising. For media providers and content creators, the impact of the new rules and regulations could be devastating. Consider recent regulatory activity at the FCC, FTC and FDA, as well as on the Hill:

1. Pending FCC-Related Proposals

The FCC is currently considering several regulatory proposals that would significantly burden advertising markets and, therefore, media markets:

- **Content-Based Ad-Blocking.** Most egregiously, the FCC is taking steps towards encouraging ad-skipping and blocking technologies, even though they are already available and utilized.¹⁴² The FCC’s March 2009 *Notice of Inquiry* (NOI) asking for comments regarding the “Child Safe Viewing Act of 2007”¹⁴³—specifically regarding the marketplace for “advanced blocking technologies” that could work across “wired, wireless, and Internet” platforms to potentially filter or block unwanted or objectionable content. The FCC explored the feasibility of blocking advertising in a fashion similar to the traditional entertainment can be blocked using the V-Chip or cable and satellite blocking technologies.¹⁴⁴
- **FCC Considering New Limits on Children’s Advertising.** In a follow-up *NOI* the Commission explored expansion to the Internet of the regulatory framework contained

¹⁴¹ *Id.* at 264.

¹⁴² Adam Thierer, The Progress & Freedom Foundation, *Parental Control Perfection? The Impact of the DVR and VOD Boom on the Debate over TV Content Regulation*, PFF PROGRESS ON POINT 14.20, Oct. 2007, www.pff.org/issues-pubs/pops/pop14.20DVRboomcontentreg.pdf; Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *Privacy Solutions Series: Part 2 - AdBlock Plus*, PFF BLOG, Sept. 8, 2008, http://blog.pff.org/archives/2008/09/privacy_solutio_1.html.

¹⁴³ Federal Communications Commission, *Notice of Inquiry In the Matter of Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, FCC 09-14, MB Docket No. 09-26, March 2, 2009, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-14A1.pdf.

¹⁴⁴ Federal Communications Commission, *Report In the Matter of Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, FCC 09-14, MB Docket No. 09-26, Aug. 31, 2009, at 17, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-69A1.pdf.

in the Children's Television Act (CTA) of 1990.¹⁴⁵ The CTA limits the amount of commercial matter that may be aired during children's television programs to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays. The *Notice* also said that, "New digital media also make possible new forms of advertising that warrant scrutiny into how they impact children" and specifically mentioned: interactive advertisements, advergames, embedded advertisements, mobile ads, behavioral advertising, and viral advertising campaigns.¹⁴⁶ Although the agency's CTA jurisdiction is limited to broadcast, FCC Chairman Julius Genachowski has suggested that expansion of the CTA will be a priority for the agency during his tenure, which could result in new advertising limits for other media and forms of advertising in the future.¹⁴⁷

- **Product Integration/Placement.** In June 2008, the FCC opened a proceeding about *Sponsorship Identification Rules and Embedded Advertising*.¹⁴⁸ The Commission noted that, "Due, in part, to recent technological changes that allow consumers to more readily bypass commercial content, content providers may be turning to more subtle and sophisticated means of incorporating commercial messages into traditional programming."¹⁴⁹ The FCC fears that, "As these techniques become increasingly prevalent, it is important that the sponsorship identification rules protect the public's right to know who is paying to air commercials or other program matter on broadcast television and radio and cable." But new embedded advertising rules would limit the ability of media operators to innovate in finding new forms of advertising to support media content, including news, especially in the face of large-scale and growing ad-blocking. And it remains unclear why new regulation would be necessary: There is scant evidence that the public either has been misled by embedded commercial matter or that it wants more program time and space devoted to commercial disclosures. Americans are not so simple-minded as to be easily misled into buying that which they neither want nor need simply because a product or service might appear or be mentioned within program material rather than apart from it.¹⁵⁰

¹⁴⁵ Federal Communications Commission, *Notice of Inquiry In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape*, FCC 09-94, MB Docket No. 09-194, Oct. 22, 2009, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-94A1.pdf

¹⁴⁶ *Id.* ¶ 36.

¹⁴⁷ Matthew Lasar, *FCC: TV Ad Content for Kids Back on the Regulatory Table*, Ars Technica, July 23, 2009, <http://arstechnica.com/tech-policy/news/2009/07/fcc-tv-ad-content-for-kids-back-on-the-regulatory-table.ars>.

¹⁴⁸ Federal Communications Commission, *Notice of Inquiry and Notice of Proposed Rulemaking In the Matter of Sponsorship Identification Rules and Embedded Advertising*, MB Docket No. 08-90, June 26, 2008, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-155A1.pdf

¹⁴⁹ *Id.* ¶ 1.

¹⁵⁰ W. Kenneth Ferree & Adam Thierer, The Progress & Freedom Foundation, *Comments of The Progress & Freedom Foundation In the Matter of Sponsorship Identification Rules and Embedded Advertising*, Sept. 19, 2008, www.pff.org/issues-pubs/filings/2008/092208SponsorshipFiling.pdf

- **Erectile Dysfunction Advertising Regulation.** Makers of erectile dysfunction ads spent \$313.4 million on advertising in 2008¹⁵¹—nearly as much as the entire 2010 Corporation for Public Broadcasting budget¹⁵²—yet pending legislation would severely restrict such advertising.¹⁵³ In May 2009, Rep. Jim Moran (D-VA) introduced H.R. 2175, the “Families for ED Advertising Decency Act,” which would regulate advertisements on broadcast television for medications that treat erectile dysfunction (ED) as “indecent” content.¹⁵⁴ Broadcasters would be forbidden from airing ED ads during the so-called “safe harbor” when indecent content is forbidden, from 6 a.m. to 10 p.m. The FCC could fine a station up to \$325,000 per infraction if broadcasters are found to violate these rules.¹⁵⁵
- **Regulation of Ad Volume on TV.** In December, the House of Representatives passed H.R. 1084, the “Commercial Advertisement Loudness Mitigation Act” (the “CALM Act”) to address the supposed scourge of “volume manipulation” in TV ads by making sure that TV ads are not “excessively noisy or strident.” The FCC would be empowered to regulate “the average maximum loudness” of ads to make sure they “shall not be substantially higher than the average maximum loudness of the program material that such advertisements accompany.” The CALM Act ignores the fact that every remote control has a mute button and, as *The Los Angeles Times* recently noted, “The market is already responding—more than 30% of TV viewers use ad-skipping video recorders.”¹⁵⁶ Moreover, new volume normalization technologies can help equalize volume across programs.¹⁵⁷

2. Pending FTC-Related Proposals

Meanwhile, the Federal Trade Commission is considering a variety of new regulatory proposals that would also dampen advertising expenditures or marketing efforts, such as:

- **Expansion of the FCC’s Rulemaking & Enforcement Powers.** In December, the House passed financial reform legislation that would dramatically expand the rulemaking and

¹⁵¹ Rich Thomaselli, *No Viagra Ads Before 10 p.m.?*, ADVERTISING AGE, May 6, 2009, http://adage.com/article?article_id=136476.

¹⁵² Corporation for Public Broadcasting, FY 2010 Operating Budget, www.cpb.org/aboutcpb/leadership/board/resolutions/090915_fy10OperatingBudget.pdf.

¹⁵³ Ken Ferree, The Progress & Freedom Foundation, *Jim Moran, Erectile Dysfunction, and Prudery Disguised as Policy*, PFF BLOG, May 12, 2009, http://blog.pff.org/archives/2009/05/jim_moran_erection_dysfunction_and_prudery_disguis.html

¹⁵⁴ John Eggerton, *Rep. Moran Re-Introduces Indecency Bill For “Male Enhancement” Ads*, BROADCASTING & CABLE, May 4, 2009, www.broadcastingcable.com/article/231141-Rep_Moran_Re_Introduces_Indecency_Bill_For_Male_Enhancement_Ads.php

¹⁵⁵ 47 U.S.C. § 503(b)(2)(C)(ii).

¹⁵⁶ *Ads Too Loud? Try ‘Mute,’* LOS ANGELES TIMES, Dec. 16, 2009, www.latimes.com/news/opinion/editorials/la-ed-loudtv16-2009dec16,0,3827673.story. Also see Berin Szoka, *Congresswoman, CALM Thyself! LA Times Eschews Eshoo Nanny State Bill to Regulate Ad Volume*, PFF BLOG, Dec. 17, 2009, http://blog.pff.org/archives/2009/12/congresswoman_calm_thyself_la_times_eschews_eshoo.html

¹⁵⁷ See Adam Thierer, The Progress & Freedom Foundation, *Loud TV Ads: No Need for Regulation*, PFF BLOG, Oct. 21, 2008, http://blog.pff.org/archives/2008/10/loud_tv_ads_no.html

enforcement powers of the FTC across the board, including the FTC's regulation of "unfair" or "deceptive" advertising practices (and not limited to financial matters).¹⁵⁸ These provisions, which may be included in a Senate bill currently under fierce debate, have gotten little attention but would, in the words of former FTC Chairman Jim Miller, "put the FTC on steroids."¹⁵⁹ Most notably, the bill would repeal procedural safeguards imposed on the FTC's rulemaking process in 1975 and 1980 to ensure that the agency did not rush into preemptive regulation without carefully weighing the costs and benefits of government intervention. This would make it substantially easier for the FTC to issue preemptive regulations. The bill would also allow the FTC could impose civil penalties on a company before even putting them on notice that it might consider a particular practice "deceptive" or "unfair"—or giving the company a chance to clean up its act. Furthermore, the bill would extend the scope of this increased legal liability to companies that merely "substantially assisted" an unlawful act, even without direct responsibility for or actual knowledge of the violation—which could create legal liability for anyone involved in the chain of producing an advertisement.¹⁶⁰

- **Online Advertising & Privacy Regulation Looming.** Rep. Rick Boucher, Chairman of the House Energy and Commerce Committee's Internet subcommittee has floated legislation that would require users to opt-in to most online data collection, including for advertising purposes.¹⁶¹ Industry analyst Bob Garfield has warned that "online advertising would be legislated into oblivion" if such legislation advances because online advertising relies heavily on data about its effectiveness and the likely interests of web users.¹⁶² PFF has long stressed that policymakers must be cognizant of the trade-offs involved in regulation of online data use, because such data is essential to the advertising that has been the lifeblood of online services and content, including news media.¹⁶³ The revenue differential between "untargeted" advertising and "behaviorally

¹⁵⁸ Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009), http://thomas.loc.gov/home/gpoxmlc111/h4173_rfs.xml.

¹⁵⁹ Brody Mullins & John D. McKinnon, *FTC's Powers Would Grow Under Financial Overhaul*, WALL STREET JOURNAL, Oct. 29, 2009, <http://online.wsj.com/article/SB125677809189114853.html>.

¹⁶⁰ See generally, Berin Szoka, The Progress & Freedom Foundation, *How Financial Overhaul Could Put the FTC on Steroids & Transform Internet Regulation Overnight*, PFF PROGRESS SNAPSHOT 6.7 (March 2010), www.pff.org/issues-pubs/ps/2010/pdf/ps6.7-FTC_on_steroids.pdf; Berin Szoka, The Progress & Freedom Foundation, *FTC Chairman Leibowitz: Just Trust Us, We Won't Abuse Vast New Powers!*, PFF BLOG, March 22, 2010, http://blog.pff.org/archives/2010/03/ftc_chairman_leibowitz_just_trust_us_we_wont_abuse.html; *Super-Sizing the FTC & What It Means for the Internet, Media & Advertising*, A PFF Hill Luncheon Briefing, April 16, 2010, www.pff.org/events/Super-Sizing_the_FTC.

¹⁶¹ Berin Szoka & Adam Thierer, The Progress & Freedom Foundation, *PFF Statement on House Privacy Bill Discussion Draft*, PFF NEWS RELEASE, May 4, 2010, www.pff.org/news/news/2010/2010-05-04-Privacy_Bill.html.

¹⁶² Bob Garfield, *FTC Privacy Review Could Mean Trouble for Online Marketing*, ADVERTISING AGE, April 19, 2010, http://adage.com/columns/article?article_id=143343.

¹⁶³ See Berin Szoka, The Progress & Freedom Foundation, *Privacy Trade-Offs: How Further Regulation Could Diminish Consumer Choice, Raise Prices, Quash Digital Innovation & Curtail Free Speech*, Comments to the Federal Trade Commission at the Privacy Roundtables, Nov. 10, 2009, www.pff.org/issues-pubs/filings/2009/111009-FTC-privacy-workshop-filing.pdf.

targeted” ads can be significant, on average twice as high according to one recent study.¹⁶⁴

- **FTC Guidelines for Online Endorsements & “Blogola.”** Although sponsorship can be an important source of revenue for online publishers, including journalists, the FTC recently declared it would regulate such product placement. In October 2009, the FTC issued updated guidelines “Concerning the Use of Endorsements and Testimonials in Advertising,”¹⁶⁵ which sought to clarify the agency’s “guidance it gives to advertisers on how to keep their endorsement and testimonial ads in line with the FTC Act.”¹⁶⁶ For the first time, the agency expanded its guidelines to bloggers or other “word-of-mouth” marketers such that if they “make an endorsement” they will be required to “disclose the material connections they share with the seller of the product or service.”¹⁶⁷ Questions were immediately raised about the practicality of the new rules, as well as the free speech issues they raise.¹⁶⁸ Media critic Jack Shafer of *Slate* argues that the new guidelines, “are written so broadly that if you blog about a good and service in such a way that the FTC construes as an endorsement, the commission has a predicate to investigate.”¹⁶⁹ It remains to be seen how the guidelines impact the growth of blogging and citizen journalism, but it would be hard to believe such ambiguous rules help.
- **Increased FTC Oversight of Marketing of Entertainment to Children.** Since 2000, the Federal Trade Commission (FTC) has surveyed the marketing and advertising practices of major media sectors (movies, music and video games) in a report entitled *Marketing Violent Entertainment to Children*. The agency hires a research firm that conducts “secret shopper” surveys to see how well voluntary media rating systems (MPAA, ESRB, RIAA) are being enforced at the point of sale. The research firm then recruits a number of 13- to 16-year-olds who make an attempt to purchase such media without a parent being present. Although these surveys have showed consistent improvement in ratings enforcement at the retail level, the FTC continues to hint that greater oversight of movie and video game trailers and other content on the Web and TV could be subject to

¹⁶⁴ Howard Beales, *The Value of Behavioral Targeting*, March 2010, www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf; See also Berin Szoka & Mark Adams, The Progress & Freedom Foundation, *The Benefits of Online Advertising & Costs of Privacy Regulation*, PFF WORKING PAPER, Nov. 8, 2009, www.scribd.com/doc/22445754/Benefits-of-Online-Advertising-Paper.

¹⁶⁵ Federal Trade Commission, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, Oct. 2009, www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf

¹⁶⁶ Federal Trade Commission, *FTC Publishes Final Guides Governing Endorsements, Testimonials*, FTC Press Release, Oct. 5, 2009, www.ftc.gov/opa/2009/10/endortest.shtml

¹⁶⁷ *Id.*

¹⁶⁸ Randall Rothenberg, *Open Letter to FTC*, Oct. 15, 2009, www.iab.net/insights_research/public_policy/openletter-ftc

¹⁶⁹ Jack Shafer, *The FTC’s Mad Power Grab*, SLATE, Oct. 7, 2009, www.slate.com/id/2231808

regulation at some point. The FTC's most recent report showed renewed interest in the placement and the nature of content in ads for movies and games in particular.¹⁷⁰

- **FTC Expedited COPPA Review / State-Related “mini-COPPA” Initiatives.** The FTC recently commenced an accelerated review of its implementation of the Children's Online Privacy Protection Act (COPPA) of 1998,¹⁷¹ which requires that child-oriented website operators or service providers “Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children [under 13].”¹⁷² As PFF recently warned in congressional testimony¹⁷³ and a major white paper,¹⁷⁴ expansion of the COPPA regulatory regime by Congress or the states would require a significant expansion of “verifiable parental consent” mechanisms for the broader range of adolescents and sites that would be covered. The irony of such “COPPA 2.0” proposals is that lawmakers would be applying a law that was meant to protect the privacy and personal information of children to gather a great deal *more* information about them, their parents, and many other adults. Regardless, the original COPPA rule may well have unintentionally limited choice and competition by driving increased consolidation in the marketplace for child-oriented sites and services online and discouraging new entry by smaller “mom-and-pop” sites that could cater to children. Expansion of the law or rule could have similar results for the broader Internet and restrict advertising, and thus funding for media.
- **Food Ads & Kids.** Pending legislation would require the FTC to regulate “advertising, promoting, and marketing directed at children and youth” to promote healthier lifestyle by limiting the amount of advertising directed at kids for foods deemed unhealthy and banning advertising for more unhealthy foods altogether.¹⁷⁵ Meanwhile, under legislation passed by Congress in 2009, the FTC is already working with the Food & Drug Administration (FDA), the Centers for Disease Control and Prevention (CDC), and the Department of Agriculture (USDA) in an Interagency Working Group on Food Marketed to Children. That group published strict advertising standards in a December FTC public

¹⁷⁰ Federal Trade Commission, *Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, Dec. 2009, www.ftc.gov/os/2009/12/P994511violententertainment.pdf

¹⁷¹ 15 U.S.C. §§ 6501–6506.

¹⁷² See 16 C.F.R. § 312.5.

¹⁷³ Berin Szoka, The Progress & Freedom Foundation, *Written Testimony for Hearing on “An Examination of Children's Privacy: New Technologies & the Children's Online Privacy Protection Act,”* U.S. Senate, Subcommittee on Consumer Protection Committee on Commerce, Science & Transportation, April 29, 2010, www.pff.org/issues-pubs/testimony/2010/2010-04-29-Szoka_Written_COPPA_Testimony.pdf.

¹⁷⁴ Berin Szoka & Adam Thierer, The Progress & Freedom Foundation, *COPPA 2.0: The New Battle over Privacy, Age Verification, Online Safety & Free Speech*, PFF PROGRESS ON POINT 16.11, May 21, 2009, www.pff.org/issues-pubs/pops/2009/pop16.11-COPPA-and-age-verification.pdf.

¹⁷⁵ Section 1(1), (13), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4053ih.txt.pdf. See generally ANA BLOG, *Moran Bill Would Severely Restrict Advertising to Children*, <http://ana.blogs.com/jaffe/2009/11/moran-bill-would-severely-restrict-advertising-to-children.html>.

forum.¹⁷⁶ Such regulations could affect a substantial source of funding for children’s content, including journalistic content, but also potentially affect funding for content primarily geared towards adults if the regulations are applied broadly enough to include parents as well as children in their scope.

- **“Green Marketing” Guidelines.** Although advertising can play a powerful role in shaping our behavior for the better, such as through using more environmentally friendly products and services, the FTC is stepping up regulation of “green marketing” in ways that could affect advertising spending on such products, which goes to support media, particularly content about environmental topics. Last year, the FTC released draft updates to the Green Guides, which were first issued in 1992, and final revisions are expected in early 2010.¹⁷⁷

Regardless of how well-intentioned these or other regulatory efforts may be, as the FCC and FTC continue their inquiries into the future of news and journalism, they would do well to remember that *an attack on advertising is tantamount to an attack on media itself*. If Washington goes to war on advertising, private media will suffer because advertising is the very mother’s milk of private media in this country.

Meanwhile, as will be noted below, it certainly won’t help matters if policymakers endorse the call by some regulatory activists such as Free Press to channel more money to public media by affixing “a small tax” on private commercial advertising.¹⁷⁸ In essence, Free Press wants to tax private media operators to fund their public media competitors. That’s a sure-fire way to destroy private journalism—forcing private media providers to fund their own, publicly-subsidized rivals.

3. *Health-Related Activities*

A number of health-related proposals could affect substantial advertising expenditures and thus ad-supported publishers, including:

- **Direct-to-Consumer (DTC) Drug Advertising.** As mentioned above in the context of erectile dysfunction ads, drug ads provide a significant source of revenue for media. In 2008, drug makers spent \$4.7 billion (or 2.5% of total drug sales) on DTC advertising: 61.5% to television broadcasters, 34.6% to print publishers and 3.6% to online publishers.¹⁷⁹ But this advertising is widely seen as a wasteful and unnecessary element and drug costs—despite clear evidence that advertising in general actually makes

¹⁷⁶ Interagency Working Group on Food Marketed To Children, Tentative Proposed Nutrition Standards, Dec. 15, 2009, http://ftc.gov/bcp/workshops/sizingup/SNAC_PAC.pdf

¹⁷⁷ 16 C.F.R. Part 260, available at www.ftc.gov/bcp/grnrule/guides980427.htm; see also Federal Trade Commission, *Sorting Out 'Green' Advertising Claims*, April 1999, www.ftc.gov/bcp/edu/pubs/consumer/general/gen02.shtm.

¹⁷⁸ Free Press, *supra* note 69 at 18.

¹⁷⁹ Congressional Budget Office, *Promotional Spending for Prescription Drugs*, Dec. 2, 2009, at 2-3, www.cbo.gov/ftpdocs/105xx/doc10522/12-02-DrugPromo_Brief.pdf

markets more competitive and brings down prices.¹⁸⁰ Thus, legislation considered this Congress would have effectively taxed DTC advertising by prohibiting drug companies from deducting advertising spending as a business expense.¹⁸¹

- **Tobacco & Liquor Advertising.** Last summer, Congress passed the Family Smoking Prevention and Tobacco Control Act, which empowers the FDA to control tobacco products—including advertising and marketing efforts. If the law survives a pending First Amendment challenge, it could set a precedent for expanded regulation of advertising for other products, like alcohol and fast food.¹⁸² But the law itself affects a significant source of advertising revenue for ad-supported media.

4. Other Regulatory Threats to Advertising

While there are many other active regulatory proposals to increase regulation of advertising that would affect ad-supported media, none is more important than the longstanding effort to end the tax deductibility of advertising expenditures—which Free Press has specifically embraced.¹⁸³ As mentioned above, this is simply a cleverly disguised tax on advertising, and it could significantly reduce advertising spending and thus revenue for all ad-supported media. Reducing the deductibility of advertising expenditures to require that companies amortize their expenditure over several years would have a similar, if smaller, effect: Because a dollar today is worth more than a dollar tomorrow, forcing advertisers to take their deduction next year rather than this year effectively taxes their expenditure by denying them the full value of the deduction.¹⁸⁴

V. OTHER TAX OR REGULATORY PROPOSALS THAT SHOULD BE AVOIDED

Over just the past few years, we’ve seen traditional media business models upended. Increased competition and technological/platform proliferation are placing an enormous strain on traditional media operations and business models. Schumpeterian “creative destruction” is at work in a serious, and for many, painful, way.¹⁸⁵

¹⁸⁰ See generally Kenneth J. Arrow, George J. Stigler, Elisabeth M. Landes & Andrew M. Rosenfield, *Economic Analysis of Proposed Changes in the Tax Treatment of Advertising Expenditures*, (Lexecon Inc., 1990), www.scribd.com/doc/27267813/Economic-Analysis-of-Proposed-Changes-in-the-Tax-Treatment-of-Advertising-Expenditures.

¹⁸¹ *Say No to Drug Ads Act*, H. R. 2966, 111th Cong. (2009), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.02966>; *Protecting Americans from Drug Marketing Act*, S. 1763, 111th Cong. (2009).

¹⁸² Suzanne Vranica, *For Ad Industry, 2010 Promises Scant Relief*, Wall Street Journal, Dec. 24, 2009, at B5, <http://online.wsj.com/article/SB10001424052748703521904574614223788268550.html>.

¹⁸³ Craig Aaron, *supra* note 82 at 6.

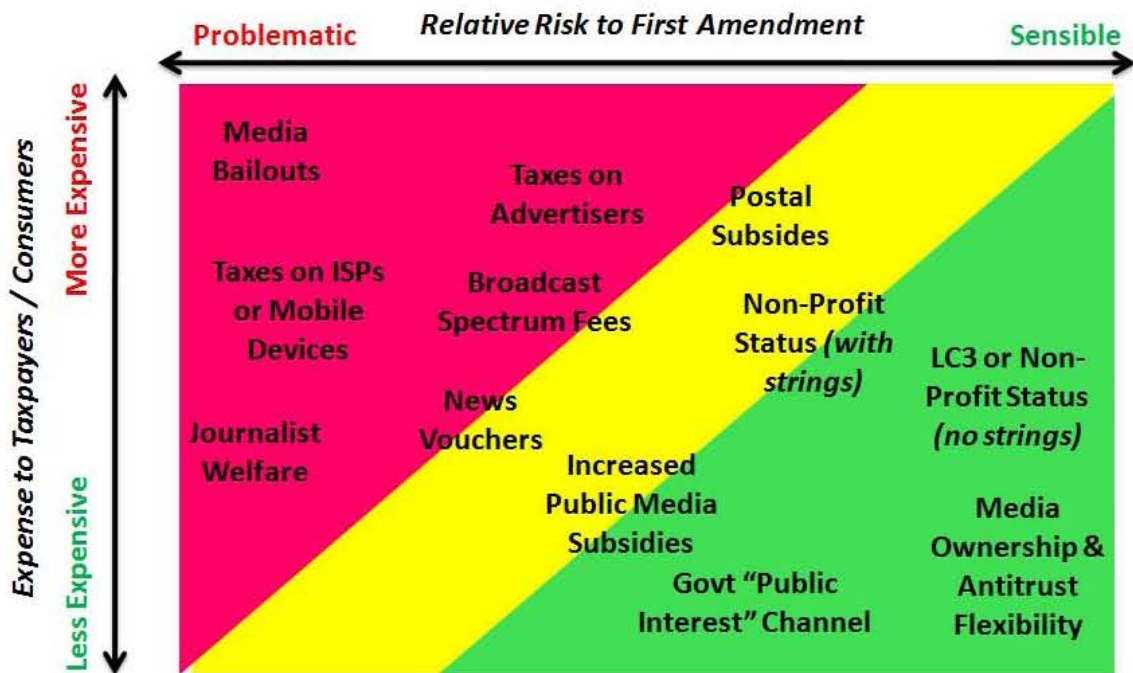
¹⁸⁴ See generally, Kenneth J. Arrow, George J. Stigler, Elisabeth M. Landes & Andrew M. Rosenfield, *Economic Analysis of Proposed Changes in the Tax Treatment of Advertising Expenditures*, (Lexecon Inc., 1990), www.scribd.com/doc/27267813/Economic-Analysis-of-Proposed-Changes-in-the-Tax-Treatment-of-Advertising-Expenditures.

¹⁸⁵ See generally Garfield, *supra* note 42; Clay Shirky, *Not and Upgrade—An Upheaval*, CATO UNBOUND, July 13, 2009, www.cato-unbound.org/2009/07/13/clay-shirky/not-an-upgrade-an-upheaval; see also *supra* note 90 and associated text.

This is what is keeping the FCC, the FTC,¹⁸⁶ some in Congress,¹⁸⁷ and many others up at night: the fear that, as traditional financing mechanisms falter (advertising, classifieds, subscription revenues, etc.), many traditional news-gathering efforts and institutions will disappear. And that's leading to calls for government intervention or assistance of some sort to prop up struggling entities or directly subsidize the hard news that many of them have traditionally provided but may not be able to for much for longer.

Exhibit 3: Evaluating the Potential Dangers of Government-Based Media Reform Efforts

A Spectrum of Government “Media Reinvention” Ideas



Source: The Progress & Freedom Foundation



In this section, we will evaluate six specific proposals that have been offered up by various scholars or public officials as a method of propping up failing media institutions, encouraging more news-gathering operations, or promoting various “public interest” objectives. Although each proposal raises unique concerns, generally speaking, they all would:

¹⁸⁶ The Federal Trade Commission (FTC) has hosted two workshops asking “How Will Journalism Survive the Internet Age?” www.ftc.gov/opp/workshops/news/index.shtml.

¹⁸⁷ Both the Senate and House of Representatives have [held hearings](#) about “the future of journalism,” and Senator Benjamin L. Cardin (D-MD) recently introduced the “Newspaper Revitalization Act,” which would allow newspapers to become nonprofit organizations in an effort to help them stay afloat—but also curtail their political editorializing. See <http://cardin.senate.gov/news/record.cfm?id=310392>.

- Raise serious First Amendment issues;
- Raise concerns regarding how eligibility is defined / determined;
- Be prone to political meddling;
- Compromise press integrity / journalistic independence;
- Burden taxpayers or consumers with new levies;
- Potentially be unfair to some private operators to the extent they're taxed to cross-subsidize public media rivals;
- Be difficult to implement in a world of media abundance and platform convergence; and
- Be unlikely to actually change the face of the media marketplace much or sustain failing media enterprises, anyway.

A. Broadcast Spectrum Fees

Some academics have suggested that policymakers should impose a tax on broadcast spectrum licenses to funnel money to public media projects or other “public interest” content or objectives.¹⁸⁸ Expressing exasperation with the traditional public interest regulatory regime (namely, its lack of intrusiveness or effectiveness), some scholars have suggested scrapping it entirely. They advocate relieving broadcasters of their public interest obligations and instead charging them an annual fee for their use of the airwaves. The proceeds from such a spectrum fee or tax would then be used to subsidize a variety of programs or content. For example:

- Henry Geller, a former FCC general counsel, first advocated such a spectrum fee scheme as a method of financing more public broadcasting programming.¹⁸⁹
- Likewise, Charles Firestone, executive director of the Aspen Institute’s Communications and Society Program, has argued that the scheme could fund “educational programs for children, free political spots on an equal opportunities basis, public service announcements, or other programming that the Government wants.”¹⁹⁰

¹⁸⁸ This section is condensed from a chapter that appeared in a new book from Congressional Quarterly Press. *Resolved, Broadcasters Should be Charged a Spectrum Fee to Finance Programming in the Public Interest, Pro: Norm Ornstein, Con: Adam Thierer*, in Richard J. Ellis and Michael Nelson, *DEBATING REFORM: CONFLICTING PERSPECTIVES ON HOW TO FIX THE AMERICAN POLITICAL SYSTEM* (2010) at 53-69.

¹⁸⁹ “By taking some modest fee from commercial broadcasters for their use of the public spectrum in lieu of the public trustee obligation, noncommercial television could be adequately funded to deliver high-quality public service programming.” Henry Geller, *Geller to FCC: Scrap the Rules, Try a Spectrum Fee*, *CURRENT.ORG*, Oct. 30, 2000, www.current.org/why/why0020geller.shtml. See also Henry Geller, *Promoting the Public Interest in the Digital Era*, *FEDERAL COMMUNICATIONS LAW JOURNAL*, Vol. 55, No. 3, 2003, www.law.indiana.edu/fclj/pubs/v55/no3/Geller.pdf.

¹⁹⁰ Charles M. Firestone, The Aspen Institute, *The Spectrum Check Off Alternative to Public Interest Regulation of Broadcasters*, www.aspeninstitute.org/policy-work/communications-society/papers-interest/-spectrum-check-alternative-public-interest-regul

- American Enterprise Institute scholar Norman Ornstein has advocated that the money be spent on a “Public Square” channel to “focus on local and national politics, policy issues, debates, campaigns, and other vital issues.”¹⁹¹
- Elsewhere, along with Paul Taylor, Ornstein has said the money raised from such fees might be spent to ensure greater election coverage or to subsidize political advertising.¹⁹²
- Leonard Downie, Jr., Vice President at Large of *The Washington Post*, and Michael Schudson, a Professor at the Columbia University Graduate School of Journalism, have advocated the creation of a “Fund for Local News” that “would make grants for advances in local news reporting and innovative ways to support it.”¹⁹³ The Fund would make grants to news organizations through “Local News Fund Councils” and would be financed by “fees paid by radio and television licensees, or proceeds from auctions of telecommunications spectrum, or new fees imposed on Internet service providers.”¹⁹⁴
- Most recently, Robert W. McChesney and John Nichols have proposed a 7% tax on broadcasters, which they estimate would generate \$3-6 billion annually. They would use it to fund some combination of all of the above items and far more, including welfare for journalists.¹⁹⁵

We might think of spectrum tax proposals as a sort of “reparations” policy for the regulatory sins of the past. That is, broadcast spectrum fees are typically pitched as a way to “repay the public” for use of the spectrum that broadcasters obtained originally at no charge. As Charles Firestone explains, in theory, the spectrum fee proposal:

provides a specific dollar value to the trade-off that has traditionally marked the public trusteeship theory of broadcast regulation. That is, for the initial grant and/or exclusive use of a valuable frequency, protected against interference or encroachment by governmental enforcement mechanisms, the broadcaster serves the needs and interests of the local audience service area.¹⁹⁶

But like the “public interest” standard itself, spectrum taxes are also an idea whose time has passed.¹⁹⁷ Broadcast spectrum fees make little sense today, even if the notion might have

¹⁹¹ See Ornstein *supra* 188 at 61. See also Remarks of Norman Ornstein at George Mason University event, *The Gore Commission, 10 Years Later: The Public Interest Obligations of Digital TV Broadcasters in Perfect Hindsight*, Oct. 3, 2008, www.iep.gmu.edu/documents/Ornstein.doc.

¹⁹² Paul Taylor and Norman Ornstein, New America Foundation, *A Broadcast Spectrum Fee for Campaign Finance Reform*, SPECTRUM SERIES WORKING PAPER #4, June 2002, www.newamerica.net/files/IssueBrief5.FreeAirTime.TaylorOrnstein.pdf.

¹⁹³ Downie & Schudson, *supra* note 3.

¹⁹⁴ *Id.*

¹⁹⁵ McChesney & Nichols, *supra* note 68 at 209-10.

¹⁹⁶ Firestone, *supra* note 190.

¹⁹⁷ Adam Thierer and Wayne Crews, Cato Institute, *Just Don't Do It: The Digital Opportunities Investment Trust (DO IT) Fund*, TECHKNOWLEDGE, No. 35, May 6, 2002, www.cato.org/tech/tk/020506-tk.html.

made some sense two or three decades ago as a method of monetizing public interest obligations.

1. *The Initial “Windfall” of Spectrum Give-Aways Has Long Since Been Dissipated by Spectrum Trading*

Using spectrum fees as a reparations policy today fails to “punish” those who originally got their spectrum free-of-charge. The vast majority of broadcast spectrum licenses have traded hands in the secondary market for lucrative sums. In many cases, those television and radio properties have traded hands numerous times. Thus, the current spectrum-holders who would be taxed are generally not the beneficiaries of any “windfall,” but have instead paid competitive market prices for the spectrum they use that should be roughly commensurate with the economic value of that spectrum (at least for the limited range of uses allowed by the FCC).

2. *Broadcasting Has Lost Its Once Unique Relevance*

Although broadcasting remains an important medium, its once-supreme relevance has eroded significantly over the past three decades. Even Norm Ornstein, a defender of broadcast spectrum fees, has argued that “Over-the-air broadcasting is a dinosaur. It’s not going to last very long.”¹⁹⁸ Although that might be hyperbole, it’s certainly true that whatever special importance the broadcast medium might have had in the past, that is now ancient history.

For most of the past century, broadcasting was a fairly stable industry that did not witness business model-shattering types of changes. As its very name implies, broadcasting attracted *broad* audiences. Consequently, returns were stable, even substantial at times. Today, however, stability has given way to volatility. The entire media marketplace is in a state of seemingly constant upheaval. Long-standing industry players are shedding assets or even disappearing as underdogs rapidly enter the sector and become big dogs overnight. This has become a textbook example of Schumpeterian “creative destruction” in action.

Consider what this has meant for broadcasters in terms of audience share and advertising revenues—starting with broadcast television. The television audience has grown increasingly fragmented since the 1950s. The top shows on TV during that era (*e.g.*, “I Love Lucy”) garnered 40-50% of the viewing audience. By the 1970s, the top broadcast TV shows (*e.g.*, “All in the Family”) were pulling in roughly 30% of the audience. Today, however, with so many other media options vying for our increasingly scarce attention, the top shows on television (*e.g.*, “American Idol”) are lucky to break 15% and most shows rarely break single digits.¹⁹⁹

The “problem” is growing competition for eyeballs. Broadcasters face a growing array of rivals: cable and satellite multi-channel distributors; DVDs and Netflix; VOD and online video; video game platforms; and much more. According to Nielsen Media Research, the “Big 3” networks of the past (ABC, CBS, NBC), which held 90% of the primetime market in 1980, today control only 30%. In terms of total day shares, cable blew past broadcast television at the turn of the

¹⁹⁸ Quoted in Neil Hickey, *TV’s Big Stick: Why the Broadcast Industry Gets What it Wants in Washington*, COLUMBIA JOURNALISM REVIEW, September/October 2002, p. 53.

¹⁹⁹ See Thierer & Eskelsen, *supra* note 12 at 58

century and never looked back. The advertising situation is equally bleak for television broadcasters. According to McCann Erickson Worldwide, broadcast television's overall share of media advertising revenues dipped below 20% back in 1990 and continues to fall steadily, standing at approximately 15% today.²⁰⁰

Unsurprisingly, the financial outlook for the broadcast TV sector is bleak. "Almost all the indicators for local TV are pointing down," notes the Pew Project for Excellence in Journalism in its annual *State of the News Media* report. It continues:

Revenue, too, was in a free fall. Ad revenue is always lower in a year without federal elections or the Olympics, but the drop in 2009 was especially severe even with the unexpected bounty of political spending on health care legislation. Revenues were estimated to have fallen by 22% from the year before. The last two non-election years, by contrast, recorded much smaller declines: 5% in 2005 and 6% in 2007. Looking ahead, most market analysts project revenues to grow only slightly, in the 3%-to-5% range in 2010, but that is hardly taken as good news given that it is a year that will include both the off-year elections and winter Olympic games.²⁰¹

In light of the recent turmoil, some major network television executives are now thinking about doing what was unthinkable just a decade ago: casting off their local broadcast affiliates and repurposing their content on alternative media platforms (*e.g.*, cable, satellite, Internet). For example, in early 2009, CBS Corp. President and CEO Les Moonves told an investor conference that moving all CBS network programming to cable and satellite platforms would be "a very interesting proposition."²⁰² If television networks start following their audience in the continuing mass exodus to alternative distribution platforms, how would local broadcast affiliates pay for a new federal spectrum fee? Even if that scenario does not develop, local television broadcasters face an uncertain future, and likely declining revenues for some time to come.

The situation for broadcast radio operators is even grimmer. The competition for our ears has never been more intense with satellite radio, non-commercial radio, iPods and MP3 players, online radio, downloadable music, podcasting, *etc.* with terrestrial broadcasters for audience share. As a result, radio operators have seen their audiences dwindle and their revenues nose-dive. According to Arbitron, time spent listening to radio has dropped for every age demographic they've measured for the past decade.²⁰³ And BIA Financial Network notes that while the radio revenue growth rate ran between 7% and 14% during the late 1990s, the

²⁰⁰ *Id.* at 60.

²⁰¹ Pew Project For Excellence in Journalism, *Local TV*, THE STATE OF THE NEWS MEDIA 2010, March 2010, www.stateofthemediamedia.org/2010/local_tv_summary_essay.php.

²⁰² Michael Grotticelli, *Local TV Stations Face Uncertain Future*, BROADCAST ENGINEERING, Feb. 23, 2009, <http://broadcastengineering.com/news/local-stations-face-uncertain-future-0223>.

²⁰³ See Thierer & Eskelsen, *supra* note 12 at 47

industry hasn't seen growth above 3% since 2002 and in recent years growth has rarely broken 1%.²⁰⁴ Furthermore, the Pew Project for Excellence in Journalism reports that:²⁰⁵

- Total radio revenue was down 18% in 2009 from 2008, according to the Radio Advertising Bureau.
- Local and national radio advertising—the biggest sources of revenue for radio—were both down and projected to continue falling at least through 2011. There was growth in online advertising, but not enough to make up for the loss of on-air advertising.
- National and local advertising fell by 20% and 19% respectively in 2009 compared to 2008. Local advertising has always been radio's lifeblood.
- Online advertising revenue saw a 13% increase in 2009, but represented only 3% of industry advertising revenue and was not enough to offset the losses in other categories.
- Off-air revenues, such as billboards and concert sponsorships, fell 9% in 2009 compared to 2008, to 1.3 billion. While these revenues currently make up only a small part of radio revenue, the continued decline of national and local advertising may add to their importance.

Again, can struggling radio broadcasters absorb the added burden of a new national spectrum tax in light of their precarious situation? Indeed, it is numbers like these that usually lead intervention-minded analysts to advocate *subsidies*, not *taxes*, for struggling media entities!

3. Broadcast Taxes Won't Necessarily Yield a Windfall for Public Media

Questions also surround the pool of funds that would be amassed through the creation of a broadcast spectrum fee. Given the declining fortunes of the broadcast industry, it seems unlikely the fee would generate as much revenue as some proponents might imagine. Let's assume, however, that the spectrum levy netted respectable sums. How would those funds be used?

America's recent experience with spectrum auction proceeds suggests that Congress would first look to use a spectrum fee to pay for federal spending priorities or pay off past budget deficits instead of channeling those funds to new "public square" or "public interest" initiatives.

4. We Already Have a Plethora of "Public Squares"

For the sake of argument, however, let's assume Congress honored a pledge to use the broadcast fee only for its intended purpose. What exactly counts as a "public square" or "public interest" initiative, and who would be in charge of it?

There seems to be little need for a new spectrum fee for "public interest" content or a "public square" channel in light of the explosion of civic-oriented and culturally enriching programming on both traditional and new media platforms. In essence, we now have many "public square"

²⁰⁴ *Id.* at 48-9.

²⁰⁵ Pew Project for Excellence in Journalism, *Audio – Traditional Broadcast and Broadcast Online*, THE STATE OF THE NEWS MEDIA 2010, March 2010, www.stateofthemedial.org/2010/audio_traditional_broadcast.php.

channels. In light of this flourishing, it's hard to take seriously the charge that "deliberative democracy" is somehow on the decline in America and that the imposition of a spectrum fee to create a government-controlled "public square channel" or more "public interest" content in general would actually change the constitution of news, culture, or civic engagement in any significant way. Again, even if government creates or subsidizes wonderful, civic- and culturally-enriching content, there's no way to force people to consume it.²⁰⁶

5. *Would Taxing Broadcasters into Bankruptcy Really Serve the "Public Interest?"*

Regardless of how spectrum fee proceeds might be spent, the proposal raises fundamental fairness issues for broadcasters. Indeed, it is doubly insulting for them. Not only has public broadcasting and non-commercial media been siphoning off more and more market share in recent years, but this proposal would impose a new tax on private broadcasters to fund those competitors (or some other media outlets) at a time when broadcasters are struggling for their very existence. If Congress imposed a spectrum fee on broadcasters, it would essentially be signing a death warrant for the medium. It's hard to see how that's in "the public interest."

B. "News Vouchers" or "Public Interest Vouchers"

Some scholars have advocate "public interest vouchers" or what McChesney and Nichols call a "Citizenship News Voucher."²⁰⁷ This is a variant on the "artistic freedom voucher," an idea first put forward in 2003 by economist Dean Baker as an alternative to copyright law as a means of incentivizing artistic creation.²⁰⁸ Free Press has also endorsed a news voucher scheme.²⁰⁹

The idea is fairly straightforward: give every American a voucher—McChesney and Nichols propose \$200—to support the non-profit news entities of their choice by listing those entities on their tax return. (If half of all adult Americans actually used their voucher it would cost at least \$20 billion/year.²¹⁰) They assume this would be an efficient way of channeling money to "hard news" providers while avoiding the serious concerns that arise when government officials or agencies are the ones providing or steering the subsidies. McChesney and Nichols go so far as to call their tax-and-redistribute proposal "a libertarian's dream," since "people can support whatever political viewpoint they prefer or do nothing at all."²¹¹

1. "Nudging" Us into Better Media Choices?

McChesney and Nichols seem to be building on the approach popularized by Richard Thaler and Cass Sunstein in their highly influential 2008 book *Nudge: Improving Decisions about Health,*

²⁰⁶ See *supra* note 95 and associated text.

²⁰⁷ McChesney & Nichols, *supra* note 68 at 201-206. McChesney discussed this idea in more detail when he spoke at the recent FTC event on saving journalism. Robert W. McChesney, *Rejuvenating American Journalism: Some Tentative Policy Proposals*, Presentation to FTC Workshop on Journalism, March 10, 2010, www.ftc.gov/opp/workshops/news/mar9/docs/mcchesney.pdf

²⁰⁸ Dean Baker, *The Artistic Freedom Voucher: An Internet Age Alternative to Copyrights*, Nov. 5, 2003, www.cepr.net/documents/publications/ip_2003_11.pdf.

²⁰⁹ Free Press, *supra* note 67 at 36.

²¹⁰ McChesney & Nichols, *supra* note 68 at 205.

²¹¹ *Id.* at 204.

Wealth, and Happiness.²¹² Based on behavioral economics studies, Thaler and Sunstein argue that both government and private actors must inevitably make decisions about “choice architecture” and that, by setting defaults, incentives and rules smartly, “choice architects” can and should improve private decision-making—but only where they can do so *without* blocking, fencing-off or significantly burdening choices.²¹³ While the media voucher proposal might not qualify as a nudge in the strict sense defined by Thaler and Sunstein, the essential similarity between the concepts lies in trying to restructure the choices Americans make about media consumption by changing *how* they spend money on media—with the declared goal of “improving” both media consumption and the media itself (by “freeing it” of supposedly evil corporate influences, no doubt).

While nudges might be less objectionable in circumstances where it’s objectively evident what’s really “good” for us, the same can hardly be said for media consumption. “Nudging” consumers towards better media choices isn’t based on clear science about, say, eating better or getting more exercise, but on highly subjective decisions about what kind of information consumption is really good for individuals, communities, and polities. For policymakers to imagine that they can steer the public’s tastes or behavior in more desirable directions through law (including media subsidy schemes) is a profoundly elitist enterprise.²¹⁴ In the case of “news vouchers,” the hope is that the public can be encouraged to at least channel *some* additional support to news-gathering activities and institutions. The problem, however, is that some people just don’t much like being “nudged” by officials from afar and they’ll often take steps to frustrate such paternalism—however ostensibly “libertarian” it might be. Such schemes could lead to a host of unintended consequences, discussed further below.²¹⁵

As a general matter, it simply isn’t possible to make consumers choose the “right” media in an age of information abundance.²¹⁶ With so many voices competing for our attention, it’s

²¹² Richard H. Thaler & Cass R. Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

²¹³ They define choice architecture as follows: “A structure designed by a choice architect(s) to improve the quality of decisions made by homo sapiens. Often invisible, choice architecture is the specific user-friendly shape of an organization’s policy or physical building when homo sapiens come into contact with it. Examples of choice architecture include a voter ballot, a procedure for handling well-meaning people who forget a deadline, or a skyscraper.” Nudge Glossary of Terms, www.nudges.org/glossary.cfm.

²¹⁴ See Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *What Unites Advocates of Speech Controls & Privacy Regulation?*, PROGRESS ON POINT 16.19, Aug. 11, 2009, www.pff.org/issues-pubs/pops/2009/pop16.19-unites-speech-and-privacy-reg-advocates.pdf.

²¹⁵ As Glen Whitman notes in challenging such “nudging”:

the new paternalism carries a serious risk of expansion. Following its policy recommendations places us on a slippery slope from soft paternalism to hard. This would be true even if policymakers — including legislators, judges, bureaucrats, and voters — were completely rational. But the danger is especially great if policymakers exhibit the same cognitive biases attributed to the people they’re trying to help.

Glen Whitman, *The Rise of the New Paternalism*, CATO UNBOUND, April 5, 2010, www.cato-unbound.org/2010/04/05/glen-whitman/the-rise-of-the-new-paternalism.

²¹⁶ Adam Thierer, The Progress & Freedom Foundation, *Why Expansion of the FCC’s Public Interest Regulatory Regime is Unwise, Unneeded, Unconstitutional, and Unenforceable*, Testimony Before the Federal

impossible make people watch, listen, or read if they don't want to. That's especially true with hard news, which has never netted major ratings. Again, as Ellen Goodman has noted, "Consumers... are likely to avoid content they do not demand no matter what the regulatory efforts to force exposure,"²¹⁷ and "regulation cannot, in a liberal democracy, force viewers to consume media products they do not think they want in the name of the public interest."²¹⁸

McChesney and Nichols' effort to sell this scheme as "a libertarian's dream" is a huge stretch. There aren't too many libertarians—or anyone else for that matter—who favor sending more money to the federal government only to win back the right to spend it on "qualifying media entities." And regarding their claim that "people can support whatever political viewpoint they prefer or do nothing at all," well, people are *already* free to do whatever they want with their money when it comes to media products! Why do we need to send money to Washington first and then have policymakers tell us how we can spend it? This seems like a needless nudge—and one that would likely result in government bureaucracy taking a cut of the money or meddling in media markets.

Analogies to educational vouchers don't work because we long ago decided to treat education as a public good and force everyone to pay for it. "Voucherization" may make sense as a more efficient and "libertarian" way to fund such traditional public goods, when we absolutely have to force people to spend money on certain goods or services. While McChesney and Nichols claim that the time has come for the government to fund media as such a public good, most people probably wouldn't agree, since the private provision of media services has worked quite well for some time—being funded by a mix of advertising and subscription revenues for centuries. They repeatedly claim that era is over (with little substantiation) but, in reality, it is *their policies* (supported by Free Press²¹⁹) that would end private, for-profit media by taxing and regulating it to death.²²⁰

2. Fights over Qualification for Subsidies Are Politically Inevitable and Will Prove Socially Corrosive

What counts as a "qualifying media entity," and how will the IRS make that call? Can just any outlet that purports to gather and report "news" draw support from this new federal program? McChesney and Nichols aren't clear: They want the IRS to "determine eligibility—according to universal standards that err on the side of expanding rather than constraining the number of serious sources covering and commenting on issues of the day."²²¹ They specify only that the entity must:

Communications Commission Hearing on "Serving the Public Interest in the Digital Era," March 4, 2010, www.pff.org/issues-pubs/testimony/2010/2010-03-04-Thierer_Remarks_at_FCC_Hearing.pdf.

²¹⁷ Goodman, *supra* note 95.

²¹⁸ *Id.*

²¹⁹ *See supra* note 82.

²²⁰ For example, among other things, McChesney and Nichols call for a 5% tax on consumer electronics, a 3% tax on monthly ISP & cell phone bills, a 2% sales tax on advertising, and a 7% tax on broadcasters. *See* McChesney & Nichols, *supra* note 68 at 209-11.

²²¹ *Id.* at 202.

- Must be a non-profit (though not necessarily a federally-recognized 501(c)(3));
- Must not accept advertising;
- Must “do exclusively media content”;
- “Cannot be part of a larger organization or have any non-media operations”; and
- Must agree that “everything the medium produces must be made available immediately upon publication on the Internet and made available for free to all.”²²²

But, anticipating objections about the dangers of political meddling, McChesney and Nichols also insist that “the government will not evaluate the content to see that the money is going toward journalism. Our assumption is that these criteria will effectively produce that result, and if there is some slippage so be it.”²²³ The only mechanism they can suggest for reducing fraud and ensuring “seriousness” is that, “for a medium to receive funds it would have to get commitments for at least \$20,000 worth of vouchers” (100 full donations of the \$200 voucher).²²⁴

But will policymakers really let citizens redeem their vouchers on *The National Inquirer* or *People* magazine (or their equivalents that agreed to McChesney and Nichols’ conditions)? How about the satirical *The Onion* or Jon Stewart’s *Daily Show*? “This is a risk we are more than willing to take,” McChesney and Nichols say since they are “operating on a gut instinct that people will use their vouchers to fund serious media while reaching into their pockets to pay for copies of *The National Inquirer* at the supermarket checkout.”²²⁵ Of course, it’s always easier to take such risks when you are playing with other people’s money! (Nearly half of all Americans don’t pay any Federal income taxes,²²⁶ so their \$200 news voucher is definitely coming out of someone else’s tax bill.)

But it’s naïve to believe this idea is going to change the face of journalism in any serious way. Most people will spend their vouchers on whatever media outlets and content they are currently consuming, which probably isn’t what McChesney and Nichols (or most policymakers) would prefer. “The program may not develop exactly the type of journalism our greatest thinkers believe is necessary,” McChesney and Nichols admit.²²⁷ But the real question is: What sort of demands will policymakers begin making if the voucher program ends up channeling money into media entities that don’t measure up to their standards or desires? Qualification criteria would inevitably become the tool of political meddling.

3. Subsidies Will Come with Strings

This raises another concern: How long will it be before government starts attaching more strings to the vouchers? To borrow a recent headline from *The Wall Street Journal*, how long

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 205.

²²⁶ www.taxpolicycenter.org/UploadedPDF/1001289_who_pays.pdf

²²⁷ McChesney & Nichols, *supra* note 68 at 205.

will it be before the “Economic Policy ‘Nudge’ Gives Way to a Shove?”²²⁸ Although, in theory, the news voucher idea lets consumers figure out how to steer the funds, it’s unlikely much of those funds would go toward hard news, civic-minded or “high brow” content if consumers were actually free to choose. How do we know this? Because we already know what consumers choose today—and those “poor” choices are part of the supposed “problem” to be solved by media vouchers. Once people start redirecting taxpayer dollars to content that the elites and policymakers don’t like, the nudge will become a shove and more interventions will follow in the form of “voucher guidance and compliance” hearings, rules, *etc.*

Moreover, many will resent subsidizing speech that is antithetical to their own values. McChesney and Nichols dismiss this natural (presumably bourgeois?) indignation by saying, “people will have to accept that some of the vouchers are going to go to media that they detest.”²²⁹ In one sense, they are dead wrong: People *won’t* just accept that. They may accept subtle, indirect subsidies, but the more clear it becomes that *they* are being forced to pay for media they detest—and that could scarcely be more clear than with a refundable tax credit “voucher”—they will protest and demand that certain viewpoints, or at least kinds of content, be deemed out of bounds.

4. The Political/Constitutional Paradox

But in another sense, McChesney and Nichols are probably correct: For such a scheme to work, it probably can’t come with any content strings, because this is probably what the First Amendment would require. Yet they don’t actually explain that point, stopping only to say that we all just have to become more tolerant of “dissent”—*i.e.*, subsidize those who disagree with us! In this sense, news vouchers therefore would likely fall prey to a common paradox faced by proposals for the government to subsidize speech: What’s politically feasible is unconstitutional and what’s constitutional is politically impossible. Specifically, the kinds of eligibility restrictions necessary to push a voucher scheme through Congress would probably cause the courts to strike down the whole scheme. Even if the courts were willing to strike down only the eligibility provisions as “severable” from the rest of the scheme, the whole scheme would likely die in the very next federal budget if the courts require the funding of “offensive” or “frivolous” content. Understanding why this is the case requires a brief overview of key First Amendment case law.

In general, “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”²³⁰ Thus, in its 1991 *Rust v. Sullivan* decision, the Supreme Court upheld a law forbidding federal funding for family planning services to go to abortion counseling.²³¹ But the Supreme Court later clarified that such viewpoint discrimination is permissible only “[w]hen the government disburses public funds to private entities to convey a *governmental* message.”²³² By contrast, where subsidies are “designed to facilitate *private*

²²⁸ Jonathan Weisman, [Economic Policy ‘Nudge’ Gives Way to a Shove](http://online.wsj.com/article/SB10001424052748704869304575103980232739138.html), WALL STREET JOURNAL, March 8, 2010, <http://online.wsj.com/article/SB10001424052748704869304575103980232739138.html>.

²²⁹ McChesney & Nichols, *supra* note 68 at 205.

²³⁰ *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

²³¹ *Id.* (emphasis added).

²³² *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (emphasis added).

speech,” government may not discriminate against viewpoints it does not like.²³³ Thus, the government may not fund legal services but bar funding for defendants trying to amend or otherwise challenge existing welfare law.²³⁴

The First Amendment prohibits not only such *viewpoint* discrimination but *content* discrimination as well. In 2003, the Supreme Court held that the University of Virginia could not exclude religious groups from drawing on the University’s Student Activity Fund, even though the Fund’s eligibility requirements did not discriminate against any particular religion.²³⁵ Yet in 1995, the Court had upheld another content restriction: a requirement that the National Endowment for the Arts (NEA) “take into consideration general standards of decency and respect for the diverse beliefs and values of the American public” when making grants to “help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of... creative talent.”²³⁶ The Court concluded, in an 8-1 majority, that the “‘decency and respect’ criteria do not silence speakers by expressly threaten[ing] censorship of ideas.”²³⁷ This decision rested largely on the fact that “Educational programs are central to the NEA’s mission” and “it is well established that ‘decency’ is a permissible factor where ‘educational suitability’ motivates its consideration.”²³⁸ The Court left the door open to future First Amendment challenges to the statute “as applied,” such as “[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints.”²³⁹

What explains these starkly different outcomes is that the Court decided that the University of Virginia’s Student Activity Fund constituted a “limited public forum”²⁴⁰ intended to “encourage

²³³ *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). The Court in *Rosenberger* noted:

even in the provision of subsidies, the Government may not “ai[m] at the suppression of dangerous ideas,” *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983), and if a subsidy were “manipulated” to have a “coercive effect,” then relief could be appropriate. See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting); see also *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (“[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints”). In addition..., a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive “certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Id. at 587.

²³⁴ 531 U.S. at 542.

²³⁵ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). The University’s rule prohibited funding of any group that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”

²³⁶ *National Endowment for the Arts v. Finley*, 524 U.S. 569, 574 (1998).

²³⁷ 524 U.S. at 583 (quoting *R. A. V. v. St. Paul*, 505 U.S. 377 (1992) (internal quotations omitted)).

²³⁸ *Id.* at 584 (citing *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982); see also *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

²³⁹ *Id.* at 587.

²⁴⁰ 515 U.S. 819 (1995).

a diversity of views from private speakers,” but the NEA did not. The University had funded *all* speech *except* “religious editorial viewpoints” from its Student Activities Fund, into which every student paid a \$14 mandatory fee each semester. By contrast, the NEA made only a limited number of grants through a “competitive process” according to principles of inherently content-based principles of “excellence” as well as “geographic, ethnic, and esthetic diversity.” Thus, it was permissible, in principle, for the NEA to exclude “indecent” content.

The Supreme Court’s decision in *U.S. v. American Library Association, Inc.* (2003) also suggests that content restrictions regarding Citizen News Vouchers would be struck down. The Court held that the First Amendment did not bar Congress from requiring in the Children’s Internet Protection Act (CIPA) that “a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them.”²⁴¹ Critically, the Court held that libraries were *not* public fora:

A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to “encourage a diversity of views from private speakers” ... but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.²⁴²

But what is the purpose of the news voucher scheme if not to “encourage a diversity of views from private speakers?” Indeed, this is precisely how McChesney and Nichols attempt to sell their scheme—as a “libertarian’s dream.” But, paradoxically, the more “libertarian” and broader subsidies for speech are, the more likely the political/constitutional paradox mentioned above is to arise.

The Citizenship News Voucher Fund proposed by McChesney and Nichols strongly resembles the University of Virginia’s Student Activity Fund: In both cases, consumers are taxed to finance a fund that is, in theory, available to any entity that meets certain basic eligibility criteria. No attempt is made in either case to ensure the quality of content or activities being funded. Indeed, McChesney and Nichols explicitly reject such oversight of voucher spending and insist that taxpayers must accept that much of the fund will simply be wasted on media that falls well short of the “hard” or “serious” news they’re trying to save. (By contrast, the Corporation for Public Broadcasting, whose budget McChesney and Nichols propose increasing nine-fold to fund more public media,²⁴³ more closely resembles the NEA as a selective grant-maker.)

²⁴¹ *U.S. v. American Library Association, Inc.*, 539 U.S. 194 (2003). See generally Robert Corn-Revere, *United States v. American Library Association: A Missed Opportunity for the Supreme Court to Clarify Application of First Amendment Law to Publicly Funded Expressive Institutions*, CATO SUPREME COURT REV. 105, 2003, www.cato.org/pubs/scr2003/publiclyfunded.pdf.

²⁴² *Id.* at 207 (quoting *Rosenberger*, 515 U.S. at 834).

²⁴³ McChesney & Nichols, *supra* note 68 at 192, 199.

Also distinguishing the Court's decision upholding CIPA's content-based restrictions is the fact that both Justice Kennedy in his concurrence and Justice Souter in his dissent (joined by Justice Ginsburg) agreed that First Amendment problems could be solved to the extent that adults could opt-out of filtering.²⁴⁴ But with news vouchers, the government either restricts the eligibility of certain publications to receive vouchers depending on their eligibility or it does not.

Furthermore, unlike with CIPA or the NEA, the Citizenship News Voucher wouldn't be related to educational settings, so it's not even clear a "decency" requirement like that Congress imposed on the NEA's grant-making could be imposed on voucher eligibility.²⁴⁵ Magazines like *Playboy* offer a mix of pornography and thoughtful commentary on the news, proving that there is a market for such combination of journalism and controversial entertainment and photography. Going even further, "Naked News" is a daily show whose buxom anchors strip while delivering the news.²⁴⁶ Why *wouldn't* millions of Americans, especially younger men, use their voucher for such content? Who's going to draw the line between porn-spiced news and "serious" content?

The typical taxpayer will be outraged by having to subsidize some media outlet, whether because of its objectionable viewpoint or indecent or unserious content. He will fiercely resist being compelled "to furnish contributions of money for the propagation of opinions which he disbelieves and abhors," as Jefferson put it. Good luck getting even the most "tolerant" gay voters, for example, to accept being taxed to pay for fundamentalist Christian perspectives on the news—or vice versa! McChesney and Nichols don't actually say anything about the First Amendment, but do recognize that, for their program to be accepted, the American people will have to swallow the "hard pill" of accepting that "some of the vouchers are going to go to media that they detest" and "embrace dissent in reality and not just rhetoric."²⁴⁷ They seem to think this "hard pill" is a benefit of their scheme because it would teach us all to be more tolerant of "dissent." That's easy for an endowed professor at a taxpayer-funded university and avowed neo-Marxist like Robert McChesney to say, but it's not likely to fly with most Americans. Disputes over "qualifying entity" eligibility will only add new rancor to the Culture Wars (over sex, abortion, religion, politics, etc.).

Realistically, it would likely take years for a news voucher bill to make its way through Congress, and if it ever did pass, it would likely be tied up in the courts for years, requiring at least one visit to the Supreme Court. If any content strings are included, the law could well lead to the same kind of ordeal as with the 1998 Child Online Protection Act, which spent nearly 9 years in

²⁴⁴ "If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case." *American Library Association*, 539 U.S. at 214 (Kennedy, J. concurring). Justice Souter agreed that it would "tak[e] the curse off the statute for all practical purposes" if adult patrons could obtain an unblocked Internet terminal "simply for the asking," but doubted this would actually happen in practice. *Id.* at 232.

²⁴⁵ *Cf. Rosenberger*, 515 U.S. at 584 ("Educational programs are central to the NEA's mission.... And it is well established that 'decency' is a permissible factor where 'educational suitability' motivates its consideration.").

²⁴⁶ See www.nakednews.com.

²⁴⁷ *Id.* at 205.

litigation and went up to the Supreme Court twice.²⁴⁸ Yet somehow McChesney and Nichols imagine their proposal will save media *today* at this critical moment of technological transition.

5. “Nudging” Us into a “Post-Corporate” Media Welfare State?

There’s a final problematic caveat to the McChesney-Nichols variant of the news voucher idea: They would disallow any copyright protection or advertising support for an entity who receives voucher funds. That’s an effort by the authors to steer even more media activity away from the commercial sphere and toward what might be thought of as a “public option” for the press—what McChesney and Nichols euphemistically (and repeatedly) call “post-corporate” media.²⁴⁹

After all, it’s important to recall that McChesney’s “ultimate goal is to get rid of the media capitalists.”²⁵⁰ So, it’s important to keep his true intentions in mind when he starts claiming to have found “a libertarian’s dream” of a solution to what ails America’s media sector.²⁵¹ It sounds more like a central planner’s dream. The true “libertarian’s dream” would be to leave Americans free to make their own choices about media without additional meddling from the State, and to look to innovation to fund media through a combination of advertising, sponsorship, subscriptions, micropayments, and other financing mechanisms.

C. Welfare for Journalists / Corporate Welfare

Although there has been no widespread outcry from journalists or media entities for a federal “journalism bailout,” a handful of academics and press officials have suggested such steps may be necessary to stem the financial “bleeding” that many media enterprises are suffering. For example, Rosa Brooks, formerly of *The Los Angeles Times*, argues:

It’s time for a government bailout of journalism. If we’re willing to use taxpayer money to build roads, pay teachers and maintain a military; if we’re willing to bail out banks and insurance companies and failing automakers, we should be willing to part with some public funds to keep journalism alive too.²⁵²

This notion of treating journalism as a public good and supporting it through sizeable state subsidies is given its fullest elucidation and defense by regulatory activists like Free Press and academics like McChesney and Nichols. As noted above, Free Press has called for a “National Journalism Strategy,” a veritable industrial policy for the press, based upon “the clear need for government action if a public good—public service journalism—is not delivered by the invisible hand of the market.”²⁵³ Similarly, McChesney and Nichols argue that “if Americans want

²⁴⁸ See Adam Thierer, Closing the Book on COPA?, TECHNOLOGY LIBERATION FRONT, Jan. 21, 2009, <http://techliberation.com/2009/01/21/closing-the-book-on-copa/>.

²⁴⁹ McChesney & Nichols, *supra* note 68 at 163.

²⁵⁰ McChesney, *supra* note 84.

²⁵¹ Adam Thierer, The Progress & Freedom Foundation, *Free Press, Robert McChesney & the “Struggle” for Media*, Aug. 10, 2009, PFF BLOG, http://blog.pff.org/archives/2009/08/free_press_robert_mcchesney_the_struggle_for_media.html

²⁵² Rosa Brooks, *Bail Out Journalism*, LOS ANGELES TIMES, Apr. 9, 2009, <http://articles.latimes.com/2009/apr/09/opinion/oe-brooks9>.

²⁵³ Free Press, *supra* note 67 at 9.

sufficient journalism to make our constitutional system work, it means we need a massive public intervention to produce a public good.”²⁵⁴

Of course, even if it is true that news (and entertainment programming, for that matter) bears some resemblance to a traditional public good, it does not necessarily follow that the State must or should fund it. This logical fallacy pervades the work of Free Press and those regulatory advocates, such as McChesney and Nichols, who argue for increased government intervention in the media marketplace. Indeed, the *entire history* of American media belies this thesis: Entertainment, journalistic, and informational media of all varieties have been funded primarily on a private, commercial basis for over 200 years.

Unsurprisingly, however, once one embraces the notion that only the State can produce public goods, sweeping calls for government intervention inevitably follow. Free Press, for example, has proposed “a journalism jobs program to support veteran, qualified reporters and simultaneously to engage young people in journalism” that would be part of AmeriCorps.²⁵⁵ Most of these ideas originate with McChesney and Nichols. As already noted, their book reads like a blueprint for government takeover of the press, and if they were honest with themselves and others, they would concede that to be the goal. They say, for instance, that:

the first order of business for those who would respond sufficiently to the current crisis is to stop the bleeding and keep as many journalists employed as possible. The United States needs to buy time to enact longer-term policies and subsidies. At the same time we must guard against squandering money on the failed firms and strategies of the past. In such a circumstance, the ideal programs are stopgap measures that can transition into long-term programs if they prove effective.²⁵⁶

McChesney and Nichols rarely pause to consider the tension between their effort to “stop the bleeding and keep as many journalists employed as possible” and the need to “guard against squandering money on the failed firms and strategies of the past.” Instead, they breathlessly rush to devise a self-described “radical” agenda²⁵⁷ to create a “post-corporate”²⁵⁸ press system. That agenda is built around a \$35 billion per year “public works” program for the press, paid for by new taxes on consumer electronics, new taxes on broadband and mobile phone services, new taxes on broadcast licensees, and new taxes on advertising.²⁵⁹ They model their intervention after the Works Progress Administration of the New Deal era. Their WPA for the press would include a “News AmeriCorps,”²⁶⁰ a “Citizenship News Voucher,”²⁶¹ a generous

²⁵⁴ McChesney & Nichols, *supra* note 68 at xii.

²⁵⁵ Free Press, *supra* note 69 at 19.

²⁵⁶ McChesney & Nichols, *supra* note 68 at 168.

²⁵⁷ *Id.* at 3, 158, 165, 221.

²⁵⁸ *Id.* at 163.

²⁵⁹ *Id.* at 210-11.

²⁶⁰ *Id.* at 170.

²⁶¹ *Id.* at 201. For a critique, see Section V.B.

expansion of postal subsidies,²⁶² a massive new subsidy for journalism schools,²⁶³ and corporate welfare for newspapers sufficient to pay 50% of the salaries of all “journalistic employees” (up to a maximum of \$45,000 per journalist).²⁶⁴ These various programs and proposal are critiqued throughout this paper.

Importantly, most of these federal handouts are subject to two caveats: To be eligible for support, media enterprises must reject or severely limit private support from advertising, and they must essentially waive the protection of the copyright laws for the content they produce. These twin caveats are an essential part of the effort to incentivize the movement toward a “post-corporate,” government-controlled.

Regardless, for the many reasons already detailed in Section II above, targeted welfare for journalists or corporate welfare raises profound First Amendment concerns because it would:

1. Make journalists and media operators more dependent upon the State;
2. Compromise press independence and diminish public trust in the free press; and
3. Result in government discrimination in the politically inescapable dilemma of determining eligibility for subsidies.

All this would also be inordinately burdensome upon taxpayers, who would effectively be subsidizing failed or failing business models. Moreover, there are better ways to assist struggling media enterprises and to facilitate expanded investigative reporting and newsgathering than by means of a massive infusion of state subsidies.

D. Embedded Taxes in Consumer Electronics or Broadband & Mobile Phone Bills

Taxing media devices or distribution systems to fund media content is an old idea that has suddenly gained new currency and seems to lie at the heart of the McChesney/Nichols/Free Press agenda as a potential framework for implementing media subsidies. Although the concept has never gained much traction here in the U.S., it’s been used by some foreign governments for many decades. Most famously, taxes on radios, eventually replaced by taxes on televisions, have sustained the BBC in the U.K. since its inception as the world’s first national broadcasting system in 1922. According to the most recent BBC annual report, the annual “fee” was raised to £142.50/year (currently \$213.43) as of April 2009. Failure to pay the fee is, of course, a crime and punished with stiff fines up to £1000 (\$1497.75)—and radio emissions from unlicensed televisions can be detected by government vans that rove Britain’s streets looking for violators.²⁶⁵ The revenue generated by the tax is then allocated among various BBC media products, with most of it going to the BBC 1 and BBC 2 television channels.²⁶⁶

²⁶² *Id.* at 168. For a critique, see Section V.B.

²⁶³ *Id.* at 170.

²⁶⁴ *Id.* at 188. For a critique, see Section V.C.

²⁶⁵ www.bbc.co.uk/aboutthebbc/licencefee

²⁶⁶ *Id.*

The U.S. has taken a different approach and rejected embedded taxes in the cost of new media devices to pay for the content delivered over those devices. (Of course, that's at least partially because we've had a strong tradition of free markets in media ever since we revolted against the Brits and mercantilism, their system of state-directed economic planning.) Generally speaking, private media operators have been expected to pay their own way in this country and not look to government for direct support.

America has had some indirect subsidies in the form of reduced postal rates for print media, as well as tax treatment for advertising. And taxpayer dollars have been channeled to the CPB/PBS/NPR regime, of course. But such public subsidy is small potatoes when compared to private media in the U.S. For example, the Corporation for Public Broadcasting's 2010 budget is just \$400 million.²⁶⁷ While many look to CPB to fund children's programming (among its many other activities), its entire budget is no more than a quarter of the total amount of U.S. advertising revenue produced by children's programming from food and beverages products alone: \$1.6 billion in 2006 by the FTC's most conservative estimates.²⁶⁸ That comparison illustrates the vital importance of advertising to media,²⁶⁹ but subscriptions, direct sales, and private patronage have also been major economic engines of media in United States.

But the idea of more direct government support for media (and journalism, in particular) has always been lurking out there. There's long been a small but vociferous crowd of academics and policymakers advocating huge increases in government spending on non-commercial or public media. And some of them have even toyed with a tax on technology to cross-subsidize the media content that flows over those devices or networks. As already noted above, McChesney and Nichols, echoed by Free Press, have proposed a 4-part tax plan to raise money (\$18-21 billion) for a massive \$35 billion/year "public works" program for the press (with the remainder coming from other sources):²⁷⁰

- a **5% tax on consumer electronics** (which they estimate would cost buyers in the aggregate \$4 billion/year);
- a **3% tax on monthly ISP & mobile service bills** (estimated to cost users \$6 billion/year);
- a **2% sales tax on advertising** (estimated to wring \$5 to \$6 billion/year out of the commercial economy); and
- a **7% tax on broadcasters** (estimated to sap another \$3-6 billion/year from an industry that is already reeling from the increased competition and dynamism of the new media marketplace).

²⁶⁷ Corporation for Public Broadcasting, FY 2010 Operating Budget, www.cpb.org/aboutcpb/leadership/board/resolutions/090915_fy10OperatingBudget.pdf.

²⁶⁸ See FTC's 2008 report, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, at ES-1-2, www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf.

²⁶⁹ Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *The Hidden Benefactor: How Advertising Informs, Educates & Benefits Consumers*, PFF PROGRESS SNAPSHOT 6.5, Feb. 2010, www.pff.org/issues-pubs/ps/2010/ps6.5-the-hidden-benefactor.html.

²⁷⁰ McChesney & Nichols, *supra* note 68 at 210-11; see also Craig Aaron, *supra* note 82.

Similarly, Downie and Schudson have advocated the creation of a “Fund for Local News” that “would make grants for advances in local news reporting and innovative ways to support it.”²⁷¹ The Fund would make grants to news organizations through “Local News Fund Councils” and would be financed by “fees paid by radio and television licensees, or proceeds from auctions of telecommunications spectrum, or new fees imposed on Internet service providers.”²⁷²

McChesney and Nichols don’t go into a lot of detail about their tax proposals, but the consumer electronics tax they favor appears to be based on the 1967 Carnegie Commission Report,²⁷³ which called for a 5% tax on all new television purchases—a variant on Britain’s annual licensing fee. But instead of just taxing “televisions”—which would be very difficult in a world of technological convergence where consumers can “watch television” on any number of devices (PCs, mobile phones, portable gaming devices, portable media players, *etc.*)—they apparently want to tax *all* consumer electronic devices. Thus, they seem to recognize the reality of convergence but their answer is to just tax *everything*!

The British themselves have struggled with technological change: In 1971, the radio fee first imposed in 1922 was abolished, and in 1972, so was the BBC’s radio monopoly, with commercial radio stations being allowed to compete with BBC Radio for the first time. One might argue that abolishing the radio tax and relying on a single tax (on televisions) to fund the BBC’s television programming (67% of BBC spending) as well as BBC radio (17%) was simply more efficient—since most consumers had a television as well as a radio. Indeed, actually implementing any media device tax in the U.S. could prove very difficult, since countering evasion would require imposing sales taxes on online retailers ranging from Amazon.com to TigerDirect.com to countless small operators who sell TVs, DVD players, cell phones, and a wide variety of other gadgets. So much for the Internet sales tax moratorium!

But the evasion problem is a real one. The BBC estimates an 8.7% evasion rate,²⁷⁴ and it’s not clear how much more (or less) of a problem evasion might be when the tax is imposed at the point of sale (as McChesney and Nichols propose) rather than every year (as in Britain). But clearly, the problem can’t be solved simply by trying to tax all consumer electronics: The higher the tax rate, the more likely a black market will develop for discounted devices—with all the problems that generally come with black markets, such as funding organized crime. Whenever someone proposes a single-digit tax rate for anything, it’s worth remembering that the federal income tax started out at 1-7% back in 1913—and, well, we all know how *that* turned out! (Top rates rose to 67-73% during World War I, fell again to the mid-20s under Coolidge, then jumped again to 63% by 1933 and didn’t fall below 50% till 1986.) Maybe McChesney and Nichols realize how ugly black markets would get if tax rates on devices rise in the future—and perhaps that’s why they’re trying to spread the pain around by taxing broadband and wireless service, advertising and broadcasting, too. But, as discussed next, that’s another problem with the plan.

²⁷¹ Downie & Schudson, *supra* note 3.

²⁷² *Id.*

²⁷³ Available at: www.current.org/pbbp/carnegie/CarnegieSummary.html.

²⁷⁴ www.bbc.co.uk/annualreport/exec/financial/index.shtml

1. Taxation Has Many Unintended Consequences & Negative Disincentives

Taxes distort markets and human behavior. Long ago, Chief Justice John Marshall taught us that “the power to tax is the power to destroy.”²⁷⁵ As the late Clarence B. Carson noted in an article of the same name:

*Any level of taxation will make some undertakings unprofitable or submarginal. In practice, any increase in taxes will drive some people out of business, prevent them from going into business, or make it difficult or impossible for them to sustain themselves by whatever they are doing.*²⁷⁶

This helps us understand why raising taxes on mobile phones and broadband bills would be particularly foolish way of supporting media: *it will distort beneficial behavior by both providers and consumers of communications conduit.*

The FCC just recently reported that cost is a major factor for many households who decide not to buy broadband service (even though it’s available).²⁷⁷ Why, after the FCC spent 13 months producing a 376-page, Congressionally mandated National Broadband Report on ways to increase the utilization and affordability of broadband, would we want to do anything to boost broadband bills, even in the name of “saving journalism”?²⁷⁸ Increased taxes on broadband bills might discourage some broadband providers from rolling out innovative new services as rapidly as planned. And once the new service tax is passed along to consumers—as *all business taxes inevitably are*—they might be less likely to adopt broadband, or might even cancel existing service. How would *that* benefit media and journalism?

The same goes for mobile phones. CTIA—The Wireless Association estimates that wireless users already pay an average 15% tax (local state and federal) on their cell phone bills.²⁷⁹ Moreover, if there is one thing we can count on, it’s that taxes inevitably rise once they get on the books, whatever the intention of their initial architects. That’s especially true when the tax creates a new class of subsidy recipients who have a vested interest in keeping the scheme alive and growing. Thus, what starts out as 3-5% tax on phones, broadband, and consumer electronics, will likely grow to be much higher over time. Pretty soon the FCC will look like the massively inefficient Department of Agriculture, doling out subsidies to everybody and his brother who qualifies for media industry corporate welfare.

²⁷⁵ *McCulloch v. Maryland*, 4 L. Ed. 579 (1819).

²⁷⁶ Clarence B. Carson, *The Power to Tax is the Power to Destroy*, THE FREEMAN, Vol. 26, No. 10, Oct. 1976, www.thefreemanonline.org/featured/the-power-to-tax-is-the-power-to-destroy.

²⁷⁷ John Horrigan, Federal Communications Commission, *Two Studies That Deepen Our Understanding of Barriers to Broadband Adoption*, BROADBAND.GOV, May 4, 2010, <http://blog.broadband.gov/?entryId=217646>

²⁷⁸ Federal Communications Commission, *Connecting America: The National Broadband Plan*, March 2010, <http://download.broadband.gov/plan/national-broadband-plan.pdf>

²⁷⁹ CTIA-The Wireless Association, *Taxes, Fees & Surcharges*, [accessed on April 13, 2010] www.ctia.org/advocacy/policy_topics/topic.cfm/TID/27.

2. *How the Funds are Allocated Will Prove Profoundly Controversial*

But the more interesting question about such a media tax may be on the *payout* side of the scheme. Herein lies a fundamental difference between the BBC model and what McChesney and Nichols are proposing: The BBC fees have always been used to fund BBC content only, not for *all* media. True, the BBC once held monopolies in radio and television, but those monopolies died long ago, and when they did, the British did *not* share fee revenue with the BBC's competitors. Instead, commercial radio and television in the UK have had to rely on subscription and advertising revenues, just as in the U.S. Thus, the British model does not answer a profoundly difficult question: Even if we assume government could create a reasonably effective media tax collection regime, who would qualify for a cut of the money?

In an age of user-generated content and a wide variety of hybrid media products, defining eligibility criteria for the subsidy would likely be significantly more challenging than it was in the past. Would blogs qualify? What about live reporting via Twitter or photo-journalism via Flickr? Who gets to decide what qualifies as news worth subsidizing, as opposed to mere opinions or aggregation? Similarly, the "Fund for Local News" and "Local News Fund Councils" favored by Downie and Schudson would be doubly problematic. They propose that, "The criteria for grants should be journalistic quality, local relevance, innovation in news reporting, and the capacity of the news organization, small or big, to carry out the reporting."²⁸⁰ But, again, who determines "journalistic quality" and "the capacity... to carry out the reporting" or even what constitutes "local" news?

Beyond such practical problems, determining eligibility raises profound First Amendment questions because, as the Supreme Court has held, "in the realm of private speech or expression, government regulation may not favor one speaker over another."²⁸¹ The Court has also held that "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system."²⁸² Thus, the government may not pick preferred classes of speakers for subsidies, just as it may not single out disfavored classes for penalties. For example, a state university may not selectively deny funding to a gay and lesbian students association, because, as the Eighth Circuit has held:

a public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis of their ideology. The University need not supply funds to student organizations; but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed. This will mean, to use Holmes's phrase, that the taxpayers will occasionally be obligated to support not only the thought of which they approve, but also the thought that they hate. That is one of the fundamental premises of American law.²⁸³

²⁸⁰ Downie & Schudson, *supra* note 3 at 93.

²⁸¹ *Rosenberger*, 515 U.S. 819, 828 (1995).

²⁸² *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983).

²⁸³ *Gay & Lesbian Students Assoc.*, 850 F.2d 361, 362 (8th Cir. 1988).

And there's also a First Amendment-related concern here associated with the potentially—if subtly—coercive effects of subsidies on the independent editorial discretion of news-gatherers. Downie and Schudson insist they “understand the complexity of establishing a workable grant selection system and the need for strict safeguards to shield news organizations from pressure or coercion from state councils or anyone in government.”²⁸⁴ Yet they hope political pressure can, somehow, be kept to a minimum. Likewise, McChesney and Nichols largely dismiss such concerns about undue political influence on subsidized entities—even though they cite several examples of politicians attempting to use the purse strings to influence PBS and NPR funding to advance a political or cultural agenda over the past four decades!²⁸⁵

Regardless, these scholars fail to account for the fact that, going forward, political pressure would likely grow in proportion to dependence of media entities upon such public subsidy and the overall amount of those subsidies. After all, we're talking about taxpayer funding for the press on an unprecedented scale here. Moreover, the more visible these subsidies become—especially then the funding goes to highly controversial media content or outlets (*e.g.*, involving pornography, vulgarity, politics, religion, abortion, homosexuality)—the more likely the public and politicians are to clamor for rules on who gets what. We've already seen a microcosm of that concern with National Endowment for the Arts funding for controversial art and culture in the past. Now imagine media subsidies on the scale that McChesney and Nichols envision coupled with Downie and Schudson's “Local News Fund Councils” sorting out competing claims and concerns. Media funding will quickly become a political circus—and another front in the ongoing Culture Wars.

Here's another concern: Will this scheme lead to more or less media competition? It would be misguided to argue that such a tax system couldn't fund *some* quality journalism and even entertainment. After all, there's some wonderful stuff on the BBC. But without having run the numbers for all countries, there seems to be a correlation between the level of government investment in media and the overall number of media outlets at the public's disposal. When visiting Europe, one is struck by how even the largest European countries have so few choices compared to what we have here in the States, and that's true across media (video, audio, print, online). Could that be because government spending (“investment”) on media has had a crowding-out effect on private media? That possibility is at least worth considering as some look to broaden public support for media here in the U.S. Government simply doesn't have a very good track record of creating innovative, competitive businesses and markets.

3. *Such a Regulatory Scheme Could Unfairly Disadvantage Private Media Operators*

Which leads to a final concern: There's just a gut-level discomfort many of us would have with the idea of government imposing even more taxes on us to support industries or interests we might find distasteful or not deserving of corporate welfare. It's one thing to say that the government should play a role at the margin funneling some money into public broadcasting efforts via the CPB for limited purposes, but it's quite another to suggest that this should be the new model upon which *all* media should rest. That's essentially what McChesney and Nichols

²⁸⁴ *Id.*

²⁸⁵ McChesney & Nichols, *supra* note 68 at 193-99.

propose in their book, on the grounds that “the old order is collapsing” and private media is dead.

Of course, it’s virtually a self-fulfilling prophecy that private media operators will fail if you impose a smorgasbord of new tax burdens on them and related devices and distribution channels—and then channel the money to “public media” competitors! Taxing advertising is particularly harmful because those taxes come straight out of the advertising revenues upon which most publishers depend for their lifeblood.

But raising prices of innovative consumer electronics like readers (*e.g.*, Amazon’s Kindle, Barnes & Noble’s Nook, Sony’s Reader or Apple’s iPad) and the wireless broadband services that connect them isn’t such a bright idea either at a time when traditional publishers are hoping that new media distribution and consumption technologies will also allow them to experiment with new business models (like selling subscriptions for magazines or newspapers tailored for these devices). Unlike the British annual license fee, a tax imposed at the point of purchase would discourage users from buying new devices. This, in turn would slow adoption of new technologies and retard innovation in a market that has seen consumers move increasingly towards replacing their old devices every few years, due to the constant increased in processing power and functionality made possible by Moore’s Law.

E. Taxes on Advertising

As noted in Section IV, advertising has been the great “hidden benefactor” that has historically cross-subsidized media and journalism in the U.S. Advertising has been particularly important for newspapers, growing from 71% of total U.S. newspaper revenue in 1950 to 82% in 2000.²⁸⁶ The Newspaper Association of America estimates that in 2008, 79% of the average newspaper’s revenues were derived from the sale of advertising space, with the rest coming from circulation.²⁸⁷

But rising competition and increased media choice has meant that both consumers and advertisers are spreading their attention and money more thinly across multiple media and communications platforms. McChesney, Nichols, and Free Press believe advertising has failed on two levels: First, it never supported enough of the media content they think would be good for us and second, total advertising spending is falling. Thus, they insist that we must give up on the idea of advertising-supported media—and, in fact, we must actually tax the shrinking base of advertising revenues as a whole to fund subsidies for the media they think is good for us. Thus, they propose a 2% sales tax on advertising (estimated to wring \$5 to \$6 billion/year out of the commercial economy),²⁸⁸ which Free Press echoes alongside a more subtle (but still substantial) tax achieved simply by tweaking the tax-deductibility of advertising expenditures.²⁸⁹ In essence, they want to squeeze the last drops out of an economic model they consider to have failed in order to create the “Public Media Trust Fund” sufficient to

²⁸⁶ Picard, *supra* note 6 at 5.

²⁸⁷ Boyle, *et. al.*, *supra* note 58, at 4, www.ftc.gov/os/comments/newsmediaworkshop/544505-00015.pdf.

²⁸⁸ McChesney & Nichols, *supra* note 68 at 210-11.

²⁸⁹ Craig Aaron, *supra* note 82 at 6.

generate the \$2.5 billion/year they think is necessary in subsidies to produce the right kind of media content.

But to paraphrase Mark Twain, the rumors of advertising's demise are greatly exaggerated. Certain categories of advertising, like classified ads, may indeed be severely disrupted, and largely disappear as major revenue sources for media. But other forms of advertising could step in to provide new funding sources—if we allow such innovation.

F. Expanded Postal Subsidies

Some regulatory activists and concerns media scholars favor expanded postal subsidies as a method of assisting struggling media enterprises.²⁹⁰ The revisionist histories penned by some of these scholars would have us believe the Founding Fathers were practically media Marxists, enthralled with public subsidization of the press. Of course, in reality, nothing could be further from the truth. Just because they provided a modest postal subsidy for press materials doesn't mean the Founders believed that government should be micromanaging or massively subsidizing this sector. The "Congress shall make no law" language found in the First Amendment confirms that.

1. The Postal Service Simply Can't Afford Expanded Subsidies

Regardless, practically speaking, the idea of expanding postal subsidies at this time seems like a non-starter. The U.S. Postal Service (USPS) simply can't absorb the losses associated with expanded postal subsidies. *The Washington Post* recently noted that, "The Postal Service is on course to lose more than \$7 billion this year, despite substantial recent cost-cutting, and it could lose more than \$238 billion by 2020. Approaching the limits of its federal credit line, the USPS must change drastically or go bust."²⁹¹ The Postal Service itself has noted that, "even if its plan [to cut losses and increase revenues] was to succeed in every action that present legislation allows, the Postal Service would still face unsustainable losses of at least \$115 billion by 2020."²⁹² Yet the Postal Service acknowledges it has "an unsustainable business model" as volume and revenues continue to plummet with no end in sight.²⁹³ Similarly, in a recent report to Congress, the U.S. Government Accountability Office (GAO) found that the Postal Service's business model "is not viable due to [its] inability to reduce costs sufficiently in response to continuing mail volume and revenue declines."²⁹⁴

One cost-saving method that the Postal Service has floated is an increase in "preferred-class pricing" (subsidized rates for media products):

²⁹⁰ McChesney & Nichols, *supra* note 68 at 168-9; Geoffrey Cowan & David Westphal, *Public Policy and Funding the News*, USC Annenberg School for Communications & Journalism, RESEARCH SERIES, 2010, at 9, <http://fundingthenews.org>; Free Press, *supra* note 67 at 36-7.

²⁹¹ *Congress is Running Out of Time to Save the Postal Service*, WASHINGTON POST, March 10, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030903337.html

²⁹² United States Postal Service, *Ensuring a Viable Postal Service for America*, 2010, at 1, www.usps.com/strategicplanning/_pdf/Ensuring_Viable_USPS_paper.pdf

²⁹³ *Id.* at 3.

²⁹⁴ United States Government Accountability Office, *U.S. Postal Service: Strategies and Options to Facilitate Progress toward Financial Viability*, GAO-10-455, April 2010, at 6, www.gao.gov/new.items/d10455.pdf.

Addressing the pricing of preferred mail—such as non-profit mail, Media Mail, Library Mail, and Periodicals—would ensure that these products get to a point where they cover costs while contributing reasonably to overhead costs. An alternative would be appropriations funding to cover the gap.²⁹⁵

Thus, it seems clear that the Postal Service itself believes even existing postal subsidies place too great of a strain on an already failing system. And the GAO notes:

Historically, some types of mail were designed to channel broad public goals, such as furthering the dissemination of information, the distribution of merchandise, and the advancement of nonprofit organizations. For example, Periodicals (mainly, mailed magazines and newspapers) have historically been given favorable rates, consistent with the view that they help bind the nation together, *but this class has not covered its costs for the past 13 fiscal years.... These escalating losses have provoked growing concern and controversy.*²⁹⁶

The report notes annual losses for the various categories of subsidized mail service and the mounting costs of subsidies, as illustrated in the adjoining exhibit.²⁹⁷

Exhibit 4: U.S. Postal Service Loses on Various Products

Table 10: USPS Money-Losing Market-Dominant Products, Fiscal Years 2008 and 2009

Dollars in millions			
Market-dominant product	Net income (loss)		Change
	Fiscal year 2008	Fiscal year 2009	
Periodicals	\$(438)	\$(642)	\$(204)
Standard Mail Flats ^a	(218)	(616)	(398)
Standard Mail ("not flat machinables" ^b and parcels)	(165)	(205)	(39)
Inbound single-piece First-Class Mail	(102)	(105)	(3)
Media and Library Mail	(58)	(74)	(16)
Single-piece Parcel Post	(64)	(61)	3
Other ^c	(37)	(23)	14
Total	\$(1,082)	\$(1,726)	\$(644)

Sources: USPS and PRC.

Note: All data are rounded to the nearest million, including totals and changes between fiscal years.

As the cost of existing postal subsidies mount, it seems likely the public wouldn't take kindly to the idea of being forced to foot the bill for vastly *increased* subsidies. According to a new

²⁹⁵ *Id.* at 14.

²⁹⁶ *Id.* at 46 (emphasis added).

²⁹⁷ *Id.* at 47.

Washington Post-ABC News poll, more Americans would rather give up some daily service than pay more to the Postal Service to cover the massive losses the Postal Service is expected to incur in coming years: 71% of those polled said they favored ending Saturday deliveries while just 44% said they favored raising stamp prices or providing additional federal funding.²⁹⁸ For these reasons, a significant expansion of media subsidies seems both unwise and untenable.

2. Significant Expansions in Postal Subsidies Would Likely Lead to Political Controversy & Meddling

Importantly, as is the case with many of the other proposals discussed herein, a significant expansion in government involvement raises the specter of increased meddling by policymakers with the media. Proponents of expanding postal subsidies often gloss over the rather horrifying history of censorship by the Postal Service.

Most notably, Nichols claims that “postal subsidies... helped to foster the abolitionist press,” and claims that this proves that “we can have a dissident, challenging—anti-government press, operating within a system of subsidies.”²⁹⁹ But, again, there’s a bit of revisionist history at work here. David Walker Howe, author of the magisterial history, *What Hath God Wrought: The Transformation of America, 1815-1848*, details the history of the Postal Service in the early Republic and its central importance (until the invention of the telegraph) as the country’s primary information distribution system. Howe notes that the newspapers (and other printed matter) constituted the “overwhelming bulk of the mail” and his account suggests that subsidies undoubtedly played an important role in increasing readership of, and competition among, newspapers—including abolitionist newspapers.³⁰⁰ But he also notes that the U.S. Postal Service effectively censored these publications in the South from the mid-1830s until secession a quarter-century later.³⁰¹ Howe notes that “The refusal of the Post Office to deliver abolitionist mail to the South may well represent the largest peacetime violation of civil liberty in U.S. history.”³⁰² He also suggests that censorship may have accelerated the radicalization of North against South, and accelerated the coming of war: “Deprived of access to communication with the South [by postal censorship], the abolitionists would henceforth concentrate on wining over the North.”³⁰³

Sadly, this kind of censorship became a distinctly illiberal American tradition. In 1865, Congress banned sending obscene materials through the mails, apparently out of concern about adult novels being mailed to Federal troops at the front.³⁰⁴ In the late 1800s, for example, Anthony

²⁹⁸ Ed O’Keefe & Jon Cohen, *Poll Says Most Americans Back Halting Saturday Mail But Not Closing Post Offices*, *The Washington Post*, March 30, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/03/29/AR2010032903823.html.

²⁹⁹ *Transcript: Saving American Journalism*, NOW ON PBS, Jan. 15, 2010, www.pbs.org/now/shows/603/transcript.html.

³⁰⁰ David Walker Howe, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 226-27 (2007).

³⁰¹ *Id.* at 427-30.

³⁰² *Id.* at 430.

³⁰³ *Id.*

³⁰⁴ Margaret A. Blanchard, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* (1992) at 16.

Comstock, founder of the New York Society for the Suppression of Vice, used the mail system as the primary mechanism of his censorship crusades. After successfully pushing Congress to pass an expanded obscenity law through Congress in 1873 that censored, among many other things, information about abortion and conception, Comstock was promptly appointed as a Post Office special agent and given the power “to seize publications and devices he considered immoral and to prosecute their senders.”³⁰⁵ Later, in 1914, the Post Office began an ongoing crackdown on James Joyce’s *Ulysses* and any publication that had the temerity to even publish passages from the work.³⁰⁶

Postal system censorship was also ramped up during World War I after Congress passed the Espionage Act of 1917, which included provisions giving the Postmaster General power to impound publications he deemed seditious. According to media historians Michael and Edwin Emery, authors of *The Press and America: An Interpretive History of Mass Media*, “some forty-four papers lost their mailing privileges during the first year of the Espionage Act and another thirty retained them only by agreeing to print nothing more concerning the war.”³⁰⁷ They note that: “The axe fell most heavily on Socialist organs and German-language newspapers; a few other pacifist or anti-Ally publications also lost their mail privileges. The *American Socialist* was banned from the mails immediately and was soon followed by *Solidarity*, the journal of the left-wing Industrial Workers of the World.”³⁰⁸ It wasn’t until 1946 that the Supreme Court finally began to constrain the Post Office’s censorial ways after it denied second-class mailing privileges to *Esquire* because it supposedly featured “morally improper” content.³⁰⁹

Of course, the worst of the Postal Service’s censorial days are likely well behind us—especially since courts today probably wouldn’t tolerate such blatant violations of the First Amendment. Nonetheless, a significant ramping-up of postal subsidies for the press creates new potential pressure points for policymakers to exploit, even if in marginal, indirect ways. Policymakers, in turn, will likely feel increased pressure from vocal constituents because, the more substantial the subsidy becomes, the more obvious it will be to taxpayers that they are paying for the cost of supporting media they may find objectionable, either because of its particular viewpoint or its content.

3. Why Subsidize Dying Distribution Methods?

Finally, why we would want to subsidize this old form of distribution anyway? Electronic media is clearly the way of the future. There’s a reason science fiction movies never show someone going out to pick up the morning newspaper in the year 2200. In addition to subsidizing

³⁰⁵ Marjorie Heins, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001) at 32.

³⁰⁶ In 1918, a publication called *The Little Review* began published excerpts from *Ulysses*. Marjorie Heins explains what happened next: “The U.S. Post Office confiscated and burned four separate issues of the *Review*, and in January 1920 told [*Review* publishers] Heap and Anderson that it would put them out of business if they continued to publish *Ulysses*.” *Id.* at 40-41.

³⁰⁷ Michael Emery & Edwin Emery, THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF MASS MEDIA (Prentice Hall, 6th Ed., 1988) at 297.

³⁰⁸ *Id.*

³⁰⁹ Heins, *supra* note 305 at 47. The case was *Hannegan v. Esquire* 327 U.S. 146 (1946).

newspaper delivery in the early days of the Post Office, between 1785 and 1845 the postal system was used to subsidize stagecoach travel and routes, even though it was more expensive and less efficient than using single riders to deliver the mail. The hope was to encourage the development of stage lines and to thereby ease interstate travel for regular citizens. Perhaps there was something to be said for that idea then, or for using postal contracts to promote the development of canals or railroads or aviation, at least these subsidies were intended to accelerate the development and adoption of *emerging* technologies, not waning ones. We would laugh today if someone told us the Postal Service should be subsidizing stagecoach travel—or any other form of transportation, for that matter. So why isn't it considered just as laughable to say that the Post Office should be subsidizing media printed on dead trees that need to be physically shuttled around the country and then disposed of? Why incur the additional “carbon footprint” of all that unnecessary rearranging and moving of atoms when we can just deal with bits?

Perhaps it is time to begin letting go of our old, inefficient physical systems for distributing information, and recognize that, in the Digital Era, communications and transportation have finally separated. Even U.S. Postmaster General John Potter has noted that his organization's business model is as outdated as the newspaper industry's:

“Twenty years ago we would laugh at the notion that a newspaper would ever embrace the idea that maybe the channel of the future is electronic and that you may have to change your business model,” Potter told a group of reporters at a breakfast sponsored by the *Christian Science Monitor*. He added, “Likewise, the postal service is in a situation where the behavior of America is changing and we have to fix and change our business model to adapt to it.”³¹⁰

At some point in the future, *newspapers* will probably gradually die out, but the news *companies* that print them and their emerging competitors will continue to produce journalism. The only difference is that they will distribute their information products over the Internet to screens (and speakers and headphones) on a wide variety of devices yet to be invented. Increasing postal subsidies merely—and quite literally—“paper over” the fundamental problem faced by traditional print media of dealing with this technological transition.

VI. PUBLIC MEDIA & SUBSIDIES CAN PLAY A ROLE, BUT THAT ROLE SHOULD BE TIGHTLY LIMITED

A. Focusing on Niches is More Sensible than a Massive Public Media Bureaucracy

To the extent public subsidies are relied upon going forward, such assistance should be focused on filling niches and should not be viewed as a replacement for traditional private media sources. Generally speaking, when it comes to public subsidies, indirect is better than direct, and bottom-up is better than top-down. A massive federal media welfare state will entail

³¹⁰ Drew Wheatley, *Postal Service Chief: Our Business Model as Outdated as the Newspaper Industry's*, THE HILL BLOG, March 11, 2010, <http://thehill.com/blogs/hillicon-valley/technology/86265-postal-service-chief-our-business-model-as-outdated-as-the-newspaper-industrys>.

inefficient bureaucracy and will probably end up resembling Soviet-style 5-year plans for industry. And the costs of failure at the local level will be far less than the cost of a failed federal program.

Importantly, the Commission shouldn't equate America's limited history of postal subsidies and tax incentives over the past two centuries with massive state intervention into the affairs of the press. Nor is there any empirical evidence pointing to clear benefits being associated with those policies or that media in the United States would essentially have died an early death without them.³¹¹

B. Public Financing Will Not Begin to Make Up the Shortfall from Traditional Private Funding Sources

The Commission must understand that public subsidies cannot possibly begin to replace the massive private expenditure that currently supports media content and news-gathering activities in this country.

Again, activists like McChesney and Free Press call for tens of billions in subsidies for media, and they want most of it to go to "non-commercial" outlets.³¹² But this is merely a drop in the bucket compared to aggregate private media expenditures, which total in the hundreds of billions each year. To be specific, \$270 billion was spent on advertising in 2008. Not all of that directly benefited or cross-subsidized private media, but much of it did. And according to the Census Bureau, when aggregated together, U.S. "information industries" include over 140,000 establishments and have over 3.3 million employees.³¹³ And the publishing industries alone (not including the Internet) are a \$300 billion a year sector.³¹⁴

Are public subsidies going to fill that void? And where will all this money come from in tight fiscal times? Finally, does Congress or the taxpaying public really have the appetite for a massive media bailout? It seems as unlikely as it is undesirable. As Alex Jones argues, the "enduring solution for preserving the iron core of news and traditional journalism standards has to be a commercial one."³¹⁵

³¹¹ W. Kenneth Ferree, The Progress & Freedom Foundation, *Another Naïve Proposal for Government Entanglement with the Fourth Estate*, PFF BLOG, Feb. 1, 2010, http://blog.pff.org/archives/2010/02/another_naive_proposal_for_government_entanglement.html

³¹² Free Press, *supra* note 69.

³¹³ U.S. Census Bureau, *Statistical Abstract of the United States*, Table 1091, <http://www.census.gov/compendia/statab/2010/tables/10s1091.pdf>

³¹⁴ *Id.*, Table 1097.

³¹⁵ Jones, *supra* note 41 at 199.

Exhibit 5: Mobile Phone Apps for Various *National* News Organizations

The Wall Street Journal



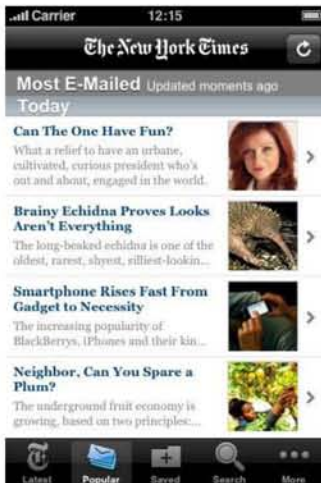
AP Mobile



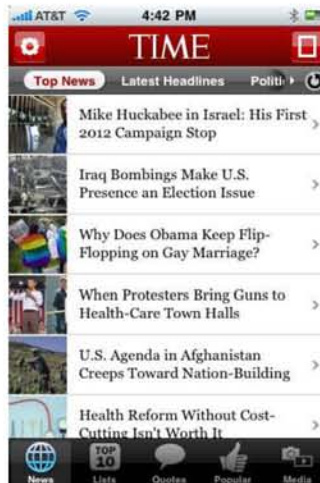
USA Today



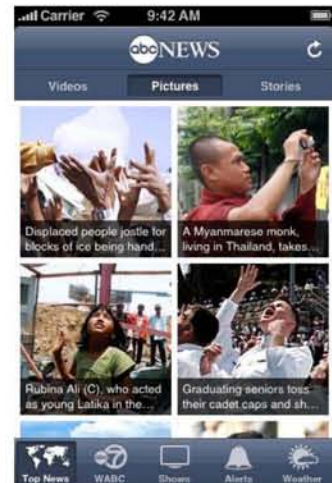
New York Times



TIME Mobile



ABC News



CNN Mobile



CBS News



MSNBC.com

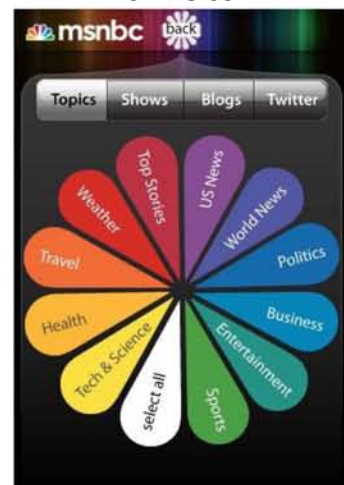


Exhibit 6: Mobile Phone Apps for Various Local News Organizations

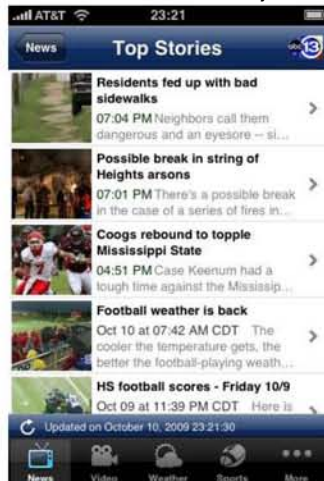
WSAZ - Huntington, WV



KOMO - Seattle, WA



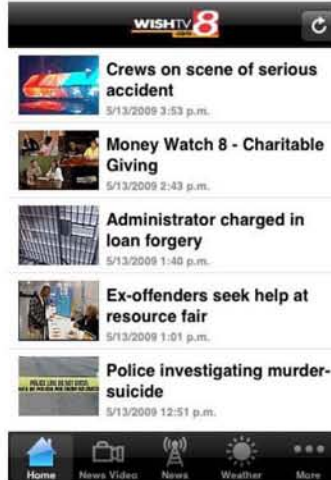
ABC 13 - Houston, TX



Dallas Morning News



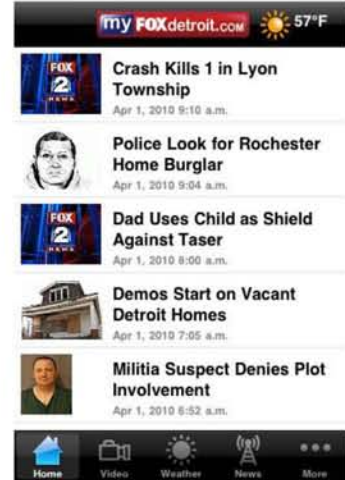
WISH TV - Central Indiana



Minnesota Public Radio



Fox 2 - Detroit, MI



Chicago Tribune



WWLTV - New Orleans, LA



VII. POTENTIALLY POSITIVE STEPS GOING FORWARD

A. Government Must Be Willing to Allow Flexibility with New Business Models

Media businesses continue to experiment with a wide variety of new business models including: micropayments, paywalls, new bundling schemes, subscription-based models, more personalized (and potentially more profitable) advertising, philanthropy, foundational support, and so on.³¹⁶ And there are many hybrid financing and distribution models developing.³¹⁷ The adjoining exhibits show how many national and local news organizations are repurposing their content on mobile platforms in an effort to reach audiences in new ways.

It remains unclear which of these models will pan out, but even if they don't work, experimentation must be allowed to discover what makes sense and what doesn't. As the Austrian economist Friedrich Hayek explained, "competition is important primarily as a discovery procedure whereby entrepreneurs constantly search for unexploited opportunities that can also be taken advantage of by others."³¹⁸ This procedure is as important in media markets as in any other markets. If allowed to unfold, such a procedure will likely lead to a diversity of competing models as technology evolves. "There is unlikely to be any single new economic model or supporting news reporting," in our new mediasphere, Downie and Schudson rightly note³¹⁹

B. Ownership Regulatory Reform & Flexibility is Essential

Importantly, relaxation of ownership regulations needs to be part of the solution. With the Commission set to take another look at the ownership regulations that continue to hamstring some media operators, the agency has another chance to loosen the artificial market restrictions that could be hampering more sensible, potentially viable business arrangements.³²⁰ Consolidation and joint ventures are not silver bullets, of course, but, again, it is essential that policymakers allow flexibility to determine what works and what doesn't. That can't happen unless policymakers allow media markets to evolve and let operators experiment with different ownership structures.³²¹

³¹⁶ For an excellent overview of business model experimentation taking place today, see: Newspaper Association of America, *Platforms for Monetizing Digital Content*, Sept. 2009, in Boyle, *supra* note 58.

³¹⁷ See Jay Rosen, *Sources of Subsidy in the Production of News: A List*, QUOTE AND COMMENT, Nov. 14, 2009, <http://jayrosen.tumblr.com/post/243813457/sources-of-subsidy-in-the-production-of-news-a-list>

³¹⁸ F.A. Hayek, *Der Wettbewerb als Entdeckungsverfahren* (a 1968 lecture sponsored by the Institut für Weltwirtschaft published as No. 56 in the series Kieler Vorträge), translated as *Competition as a Discovery Procedure*, 5 QUARTERLY JOURNAL OF AUSTRIAN ECONOMICS 3 at 18 (2002), http://mises.org/journals/qjae/pdf/QJAE5_3_3.pdf.

³¹⁹ Downie & Schudson, *supra* note 3 at 75.

³²⁰ Adam Thierer, MEDIA MYTHS: MAKING SENSE OF THE DEBATE OVER MEDIA OWNERSHIP (2005), www.pff.org/issues-pubs/books/050610mediamyths.pdf

³²¹ See W. Kenneth Ferree, The Progress & Freedom Foundation, *Media Ownership Proceedings*, Testimony before the Federal Communications Commission, Nov. 3, 2009, www.pff.org/issues-pubs/testimony/2009/11-03-09-ferree-media-ownership-testimony.pdf; Adam Thierer, MEDIA MYTHS: MAKING SENSE OF THE DEBATE OVER MEDIA OWNERSHIP (2005), www.pff.org/issues-pubs/books/050610mediamyths.pdf

Policymakers must be willing to grant private media operators that flexibility so they can restructure their business affairs and can continue to provide important public needs while also turning a profit. As Rupert Murdoch has noted, “If we are really concerned about the survival of newspapers and other journalistic enterprises, the best thing government can do is to get rid of the arbitrary and contradictory regulations that actually prevent people from investing in these businesses.”³²²

To the extent that “market power” is the issue here, it’s worth noting that, “Concentration of ownership in the U.S. [newspaper industry] is relatively moderate by global standards.”³²³ The same is true for other media sectors. It is almost impossible to believe that any specific media provider would grow so large as to monopolize the dissemination of all information in a geographic region, but if that occurred, the antitrust laws would be employed to deal with the situation.³²⁴ But what the late political scientist and communications theorist Ithiel de Sola Pool argued two decades ago is even truer today: “There are no limits to the growth of ideas.”³²⁵ Information and entertainment simply cannot be monopolized in a free society, especially in today’s world of media abundance.³²⁶

C. Copyrights Must Be Honored & Enforced if New Media Business Models Are to Work

If private media producers and operators are to be expected to reinvent themselves and thrive going forward, it is important that they be able to secure their copyrighted content. While this problem has been particularly acute for entertainment media, it is becoming an increasing problem for news media as well.

To be sure, there are thorny fair use questions in play here when only a portion of a news article is used. What should be uncontroversial, however, is that the complete taking of a journalistic work by a third party without compensation constitutes blatant free-riding and violates the rights of copyright holders.

More to the point, for new media business models to work effectively, copyrights *must* be honored and enforced. Whatever the for-profit model we are talking about—advertising, licensing, micropayments, *etc.*—content creators must be able to tag and track their copyrighted works if they expect to be compensated for their creative works. The Associated Press (AP) notes that, “Original news content such as that produced by The Associated Press

³²² Murdoch, *supra* note 56 at 15.

³²³ Picard, *supra* note 6 at 7.

³²⁴ Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATHOLIC UNIVERSITY LAW REVIEW (1989) at 466-469.

³²⁵ Ithiel de Sola Pool, *TECHNOLOGIES WITHOUT BOUNDARIES* (1990) at 236.

³²⁶ Similarly, former FCC Commissioner Kathleen Abernathy has argued: “[G]iven... the breakneck pace of technological development, and the ever-increasing number of pipelines into consumers’ homes, it is simply not possible to monopolize the flow of information in today’s world.” Statement of Commissioner Kathleen Q. Abernathy, “2002 Biennial Regulatory Review, Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,” June 2, 2003, at 4, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A4.pdf.

and its members increasingly is being used across the Web without appropriate permission or compensation, and the problem is rapidly spreading to other digital applications.”³²⁷

Luckily, as the Newspaper Association of America (NAA) notes, such experiments are already underway:

Newspapers are moving toward the creation of consortia that will use new and developing technologies to track online uses of text and other works, to ensure that, where appropriate, the copyright owner is compensated for exploitation of exclusive rights in intellectual property, and to take into account the fair use of copyrighted works and the balancing of interests of users and creators.³²⁸

The AP News Registry is probably the prime example at this time. It will cover the AP’s 1,400 member newspapers and all their text, photos, and video. According to NAA, the AP Registry,

will license content through the Registry on terms and conditions set by the individual newspapers themselves. For AP content, the AP will offer a base license for online display, with an additional license for further aggregation, syndication, or email services. The Registry will point and provide links to the websites of the newspapers that are breaking the news and originating story content, driving traffic to those websites rather than to third-party sites that aggregate that news and optimize it for third-party search engines.

“The News Registry is a fundamental and powerful means to protect valuable and costly news content to assure that news organizations like AP can continue to support original journalism,”³²⁹ argues AP. “AP, for example, spends hundreds of millions of dollars every year gathering and reporting the news, from bureaus in 243 locations around the world.”³³⁰

While other news-gathering and reporting organizations may not have the reach of AP, it is equally essential that they all have some means of tagging, tracking, and then monetizing their content in the future. In November 2009 comments to the Federal Trade Commission, the NAA documented several other “Platforms for Monetizing Digital Content,” which were monetization models submitted by a variety of organizations and companies, including Google, Microsoft, IBM, Oracle, and many others. Although the plans vary in implementational details, what each one implicitly requires to work effectively is a clear delineation and acknowledgment of the intellectual property rights of news organizations.

Again, striking the right balance here is difficult, and legitimate fair use questions come into play. But it’s important to recall that fair use has also been essential to news creators themselves and they are among its most vociferous defenders. Thus, the news media has a

³²⁷ Associated Press, *Protecting AP’s Intellectual Property*, Oct. 13, 2009, www.ap.org/iprights/faqiprights.html#one

³²⁸ Boyle, *et. al.*, *supra* note 58, at 4, at 11.

³²⁹ Associated Press, *Protecting AP’s Intellectual Property*, Oct. 13, 2009, www.ap.org/iprights/faqiprights.html#one

³³⁰ *Id.*

uniquely strong incentive among speech industries to strike an appropriate balance in fair use. While the evolving technologies of blogging, RSS syndication, and other Web 2.0 tools present thorny questions about fair use in practice, we ought to be able to distinguish, in principle, between two extremes:

- **Clear fair use:** A blogger simply quotes a few paragraphs from an article to comment on breaking news, links to the original source of the article and specifically attributes the quote to that source in the piece; and
- **Clear expropriation:** An aggregator site simply scrapes and reprints *entire* articles from others sites and services without adding any value or content, regardless of whether the aggregator links back to, or credits, the source.

Finally, the easiest answer is simply not to weaken copyright protections in the ways some regulatory advocates like McChesney and Nichols suggest. As noted previously, they go out of their way to deny any copyright protection to news organizations as a condition of the “reform” efforts they propose via conditional subsidies. That’s a recipe for the quick death of private, for-profit media—which is, of course, is precisely their intention in creating a “post-corporate” media that will facilitate the broader political “revolution” they seek.

D. Non-Profit & Low-Profit Status, Foundational Support & Philanthropy Should Be Allowed But Not Micromanaged

If non-profit status for ailing media entities is considered as part of the solution, policymakers must not force those entities to surrender their commercial practices, such as some have advocated. Similarly, non-profit status shouldn’t come with burdensome strings attached.

For example, legislation has been offered in the Senate, S. 673, by Sen. Benjamin Cardin (D-MD) and in the House, H.R. 3602, by Rep. Carolyn Maloney (D-NY) that would allow newspapers to seek tax exempt status under section 501(c)(3) of the tax code. However, the measures would require equal amounts of editorial and advertising content, which would force most newspaper to drop about a sizeable portion of their advertising. Picard estimates a third of their current advertising would need to be dropped to comply.³³¹ Worse yet, the measures would forbid political editorializing in exchange for non-profit status. This is a blatant effort to protect incumbent politicians from criticism and allow them to gain greater control over media outlets.

Picard argues, of such measures:

Although well intentioned, the bills would have limited impact on the newspaper industry because most papers are making profits and would be uninterested in the status and because the non-for-profit tax status would preclude some commentary and taking stances on legislation and candidates for office—part of the important contribution newspaper make to the democratic process.³³²

³³¹ Picard, *supra* note 6 at 12.

³³² *Id.*

More practically speaking, it's highly unlikely that non-profit status will help those media operators that are already struggling for survival. Alex Jones argues of non-profits that, "this is a good model in certain circumstances, but seems unlikely to be one that can be widely imitated."³³³

More profoundly, it's unlikely that non-profits could ever be able to match the scale of operations and investment of for-profit media operators.³³⁴ "It would take an endowment of billions of dollars to produce enough investment income to run a single sizable newspaper, much less large numbers of papers in communities across the country," say Downie and Schudson.³³⁵

Nonetheless, if non-profits are part of the mix going forward, they will need to be granted the same business model flexibility as other private, for-profit entities. Hybrid arrangements including co-op models and joint ventures may be necessary to allow non-profits to attain the scale needed to survive. It is worth noting that many foreign "public media" efforts have massive scale (often through consolidation at the national level at the expense of localism) and if we expect non-profit operators to survive, they'll likely need some serious scale as well.

E. Government Can and Should Act to Make More Information about Itself Available and Accessible to Citizens

Eric Newton, Vice President of the Journalism Program at the John S. and James L. Knight Foundation, has noted that:

The government itself is a huge producer of mass media today. But in general not a very good one. For the most part, local, state and national government can't seem to use the new technology to do a better job obeying its own freedom of information laws, not even on the people's web sites that it now runs.³³⁶

This is probably the simplest step the government can take to make sure that information about itself is more widely available and accessible to the citizenry. In Chapter 15 ("Civic Engagement") of the *National Broadband Plan*, the Commission outlined several sensible proposals to create "an open and transparent government."³³⁷ In particular, we wholeheartedly endorse the Commission's pursuit of accessibility and transparency when it says: "The primary legal documents of the federal government should be free and accessible to the public on digital platforms," and "Government should make its processes more transparent and

³³³ Jones, *supra* note 41 at 215.

³³⁴ Alan Mutter, *Non-Profits Can't Possibly Save the News*, REFLECTIONS OF A NEWSOSAUR, March 30, 2010, <http://newsosaur.blogspot.com/2010/03/non-profits-cant-possibly-save-news.html>.

³³⁵ Downie & Schudson, *supra* note 3 at 21.

³³⁶ Eric Newton, *Comments In the Matter of News Media Workshops: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age*, Dec. 2, 2009, www.ftc.gov/os/comments/newsmediaworkshop/544505-00039.pdf.

³³⁷ Federal Communications Commission *Connecting America: The National Broadband Plan*, March 2010, at 300, www.broadband.gov/plan/15-civic-engagement.

conducive to participation by the American people.”³³⁸ On a high level, we could do no better than reiterate the seven core principles cited in the founding documents of the newly formed, bipartisan Congressional Transparency Caucus:

1. **The American people have the right to public access to all of their government's information.** All of the federal government's information, with a few well-defined exceptions, should be freely available online.
2. **The American people have the right to analyze their government's information.** The federal government's information should be published in its raw format, downloadable in bulk and machine-readable, so that citizens and watchdog groups can collaborate on new ways to examine it. The government should adopt consistent data standards so that different agencies' forms, filings and records can all be searched together. All documents should be published at permanent Web addresses so that links to them remain valid.
3. **The American people have the right to interactive access to federal laws, regulations, and rules.** All federal laws, regulations and rules should be published online in a format that makes them easily searchable, sortable and downloadable, so that citizens can electronically participate in the development of laws, regulations and rules.
4. **The American people have the right to track all federal spending and scrutinize the federal budget.** Data on how taxpayers' funds are spent, and the federal budget itself, should be searchable, with every earmark and appropriation electronically identified.
5. **The American people have the right to demand objective, transparent performance standards for all federal agencies.** Federal agencies should track their goals and achievements using a format that is electronically searchable, sortable and downloadable, so that spending data can be associated with performance.
6. **The American people have the right to aggressive, independent oversight.** Inspectors general at federal agencies should be kept independent and active, and should regularly evaluate transparency in government. The House and Senate committees on Government oversight and operations should conduct regular hearings and investigations on transparency. Disclosures by regulated entities—such as filings by lobbyists, federal contractors and grantees, banks and public companies—should be published online, in formats that make them easily searchable, sortable and downloadable. Citizens should be empowered to scrutinize these disclosures and collaborate to expose corruption, fraud and other abuses.
7. **We must institutionalize a culture of open government.** For the government's default setting to change from a presumption of secrecy to one of openness, a cultural shift must occur. Through education and outreach, Congress should

³³⁸ *Id.* at 299.

strive to encourage decision-makers throughout all branches of the federal government to choose openness over secrecy.³³⁹

Discussions of government transparency usually focus on “citizens” and “watchdogs,” and these surely will have an increasingly important role to play in holding our elected representatives and civil servants responsible for how they use the funds and powers “We the People” have given them. But journalists, both in traditional media outlets and in their emerging “new media” competitors, will continue to provide an indispensable service to the public and our democracy by bringing their analytical expertise to bear on all this information.

In particular, the Commission should work with other agencies to broaden access to government data by improving the Freedom of Information Act (FOIA) process. Ultimately, all government information currently required to be provided by FOIA *upon request* (i.e., excluding certain categories of truly sensitive government, business, or personal data) should be made available *proactively* and in an easily accessible data. As Rep. Darrell Issa declared at the launch of the Congressional Transparency Caucus, the goal should be “uniform searchability of government data.”

The Federal government should assist with ensuring the implementation of this kind of transparency at all levels of government, down to the neighborhood level. As the Knight Commission declared:

Communities should have at least one well-publicized portal that points to the full array of local information resources. These include government data feeds, local forums, community e-mail listservs, local blogs, local media, events calendars, and civic information. The best of these hubs would go beyond the mere aggregation of links and act as an online guidebook. They would enable citizens to map an effective research journey by letting people know what is available and where. The site should leverage the power of new forms of social media to support users in gathering and understanding local information.³⁴⁰

The federal government can help achieve this goal—first, by providing an outstanding example of transparency and second, by blazing a trail in the specific technical implementation of best practices for government transparency.

F. Government Could Create a Public Portal for Civic Affairs Programming & Information

The federal government could also play a critical role in providing a single portal for information about government at all levels—to allow “one-stop-shopping” by journalists, watchdogs and interested citizens. In the *National Broadband Plan*, the Commission proposed that, “The federal government should create and fund Video.gov to publish its digital video archival

³³⁹ Congressional Transparency Caucus, *Our Principles*, March 2010, http://quigley.house.gov/images/stories/2010-03-10_Transparency_Caucus_-_Our_Principles.pdf.

³⁴⁰ Knight Commission on the Information Needs of Communities in a Democracy, *INFORMING COMMUNITIES: SUSTAINING DEMOCRACY IN THE DIGITAL AGE* (2009) at 61, www.knightcomm.org/wp-content/uploads/2010/02/Informing_Communities_Sustaining_Democracy_in_the_Digital_Age.pdf.

material and facilitate the creation of a federated national digital archive to house public interest digital content.”³⁴¹

Such a public portal could help make available video from government meetings and government publications (important as it is that those things be accessible) and much more information about, and generated by, government (again, subject to certain, well-defined and well-justified exceptions). Government has the unique ability to leverage existing sites and services to re-aggregate fragmented audiences get them to focus on information deemed important.

The FCC could work with other federal and state entities to create this massive “Public Interest Portal.” It would aggregate and promote the sort of the public interest programming and content that policymakers hope will gain more widespread distribution—whether produced by traditional programmers, niche professionals, or amateurs. At a minimum, it could simply aggregate and make more accessible government data and information. The collaborating agencies might even be able to create a downloadable widget or toolbar for use on any web browser or mobile device that could enable citizens to instantaneously access a wide variety of public interest content.

Consider how federal agencies are already doing this in an effort to promote Internet safety and security. A dozen federal agencies and several private child safety organizations have collaborated³⁴² to create the OnGuardOnline.gov website, which “provides practical tips from the federal government and the technology industry to help you be on guard against Internet fraud, secure your computer, and protect your personal information.”³⁴³ Many private organizations already offer similar portals for beneficial children’s content.

There’s no reason that model couldn’t be expanded significantly by the FCC and other government agencies if they put their resources behind it. Norm Ornstein of the American Enterprise Institute has suggested a similar idea with his “Public Square Channel” proposal, which sounds a bit like a combination of PBS, NPR and what C-SPAN and its sister channels and websites already offer.³⁴⁴ Unfortunately, however, Ornstein’s proposal relies upon a wealth transfer from private broadcaster operators to the government to fund this initiative. That’s a mistake. Again, forcing struggling media operators to fund their public sector competitors raises fundamental fairness issues and potentially skews media markets in favor of public sector media providers. Nonetheless, general treasury funds could be used to support such a scheme without unjustly burdening private media operators with new levies.

³⁴¹ FCC, *supra* note 337 at 300.

³⁴² www.onguardonline.gov/about-us/overview.aspx

³⁴³ Among other things, the effort includes a “Stop-Think-Click” promotion that recommends “Seven Practices for Safer Computing.” www.onguardonline.gov/pdf/tec04.pdf. This 54-page document, which is being widely distributed by the government (both online and offline), is an outstanding resource for parents and kids. See www.onguardonline.gov/default.aspx

³⁴⁴ See: *Resolved, Broadcasters Should be Charged a Spectrum Fee to Finance Programming in the Public Interest*, Pro: Norm Ornstein, Con: Adam Thierer, in Richard J. Ellis and Michael Nelson, *Debating Reform: Conflicting Perspectives on How to Fix the American Political System* (2010) at 53-69.

Of course, the success of this approach is by no means guaranteed since, as noted above, it's impossible to force a free people to consume content they do not demand. Moreover, there might already be somebody out there already doing some of these things and probably doing it than the government can. Witness C-SPAN or the countless websites and applications providing access to public information and "public interest" content on the Internet.

Nonetheless, a government-backed "Public Interest Portal" or "Public Square Channel" would allow the government to at least accomplish a primary objective it has long sought to achieve through affirmative regulation of commercial media providers: increasing the availability and practical accessibility of public affairs programming. Moreover, this approach would have the advantage of not raising serious constitutional objections or burdening commercial media operators with onerous new regulatory requirements or fees. If, however, policymakers reject this approach on the grounds that citizens would still "tune in" to other types of programming first, this would only confirm the fundamental elitism that some of us have long suspected truly animates most "public interest" regulatory efforts.

VIII. CONCLUSION: FLEXIBILITY & WILLINGNESS TO CHANGE—FOR INDUSTRY & GOVERNMENT ALIKE—IS THE KEY

We agree with Andrew Jay Schwartzman of the Media Access Project when he states he is "in favor of experimentation with most of these models, because the ultimate answer is in innovation and adaptation to the changing circumstances."³⁴⁵ Unfortunately, like so many other media policy pundits and regulatory advocates, Schwartzman quickly counters the thrust of that sage advice by specifying which public policies he'd like to see taken off the table while hand-picking others he wants government to pursue.

Instead, policymakers would be wise to heed the advice of the Knight Commission on the Information Needs of Communities in a Democracy when it argues:

Government's first role should be to let experimentation thrive. Governments should avoid regulations that distort incentives. Rules should not make investments in traditional media artificially more attractive than new ventures, or vice versa. Governments should be careful not to pose barriers to innovation.³⁴⁶

"Greater experimentation will win," says The Media Consortium. "Journalism organizations must increase their capacity to innovate with new technology, journalistic practices and business models."³⁴⁷ In a world where "only the paranoid survive," to borrow Andy Grove's memorable phrase, exciting but uncertain things are occurring.³⁴⁸ "Being terrified has

³⁴⁵ Schwartzman, *supra* note 2 at 3.

³⁴⁶ Knight Commission, *supra* note 340 at 33.

³⁴⁷ The Media Consortium, *supra* note 128 at 5.

³⁴⁸ Andy S. Grove, *Only the Paranoid Survive: Book Preface* (1996)
www.intel.com/pressroom/kits/bios/grove/paranoid.htm

prompted more energy and innovation in the news business than ever,” notes Alex Jones.³⁴⁹ Of course, “being terrified” is also leading others to claim that the sky is falling and the end times are near for private media in America. The Commission would be wise to reject such Chicken Little-ism and exercise the patience to see how things play out.

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³⁴⁹ Jones, *supra* note 41 at 219.